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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT

STATE OF VERMONT.



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BY JOHN F. DEANE,
COUNSELLOR AT LAW.

NEW SERIES--VOL. III.

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JUDGES
OF THE
S U P R E M E C O U R T

DURING THE TIME OF THESE REPORTS.

HON. ISAAC F. REDFIELD, CHIEF JUDGE.

HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

ERRATA.

- Page 268, line 18 from bottom, for "*wrs*," read "*was*."
" 891, line 4 from bottom, for "*refer*," read "*refuse*."
" 683, line 9 from top, for "*indorantia*," read "*ignorantia*."
" 671, line 8 from top, for "*petitioners*," read "*petitionees*."

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CHITTENDEN,
DECEMBER TERM, 1853.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

MARCUS SWAIN v. ORLIN TYLER.

Book Account. Parent and Child. The parent liable for necessities furnished minor son, after contract, by which he gave the son his time, and publication of the same, in certain cases.

Where the father had given his minor son leave to act for himself, and had made publication of the fact, and that he would not thereafter pay any debts of the son, and the son returned to his father's house sick, and the plaintiff's charges were for necessary medical services rendered the son, upon the credit of the father, and in good faith charged to him at the time, and the father knew of the services being rendered and did not object, it was held, that the law implies a promise to pay, though the father did not assent to the services being done on his credit, either expressly or impliedly, in fact.

Swain v. Tyler.

And it was *held*, that this rested on the general ground, that while one's minor children remain a part of the father's family and household, and receive necessities, with the knowledge of the father, and without objection, on his part, it is the same thing as if he received them himself, or his wife received them.

BOOK ACCOUNT. Judgment to account was rendered in the County Court, and an auditor was appointed, who reported the following facts:

That in September, 1848, the defendant made a contract with his minor son, Lewis Tyler, who was then about nineteen years of age, upon the consideration of twenty dollars, by which he relinquished to said son all the future earnings of said son up to his majority, and said son promised to take care of himself, and call upon his father for no further aid.

That in October, 1848, the defendant published in the Burlington Sentinel, a newspaper, which then circulated to some extent, in the town of Essex, where the parties resided, a notice, stating said contract, and stating that the defendant would not pay any debts of the son's contracting thereafter.

That Lewis, the son, in pursuance of said contract, left his father's house in Essex, and worked about on his own account in various places, until just before the time of the first visit of the plaintiff, in October, 1849, when the said Lewis was taken ill, and went to his father's, the defendant's house, and continuing ill, on the 17th day of October, 1849, in the absence, and without the knowledge of the defendant, sent one of his brothers, (another son of the defendant,) for the plaintiff, who was a physician. The brother thereupon went to the plaintiff's house, and the plaintiff being absent, left a general request for the plaintiff to come, professionally, to the house of the defendant, without stating who was sick. The plaintiff on his return soon after, received the message and went to the defendant's house and found the said Lewis ill, (the defendant being still absent at said first visit,) and administered to him as his necessities required, upon that occasion and the occasions stated in the account, in good faith, and upon the credit of the defendant, making said charges to the defendant from time to time.

That nothing was said between said Lewis and the plaintiff as to paying for said attendance, nor between the plaintiff and defendant, although the defendant was sometimes at home when the plaintiff came on said visits, nor did the defendant know that the

Swain v. Tyler.

plaintiff was making the said visits on his credit, and that he did not assent to the same; and the said Lewis had no authority in fact, to employ the plaintiff on the credit of the defendant.

That the plaintiff had no knowledge of the said agreement between said defendant and said Lewis, or of said notice published by the said defendant. That at the time the plaintiff made said visits, the said Lewis was a minor, about twenty years old.

The County Court accepted the report of the auditor, and rendered judgment thereon for the plaintiff.

Exceptions by defendant.

Underwood & Hard for defendant,

Insisted, that the relation existing between the defendant and his minor son, is not alone sufficient to make the former chargeable for the debts of the latter, even for necessaries.

To render the father liable on the contracts of the son, the same facts must be shown as would be required to charge any other persons, viz: that the son had authority, either express or implied, to pledge the credit of the father, or that the father afterwards assented to or adopted the contract; and whether such authority or adoption was shown, was a question of *fact* exclusively within the province of the auditor. *Gordon v. Potter*, 17 Vt. 348. *Mortimore v. Wright*, 6 M. & W. 482. Bing. on Infancy, 87. (Note.)

A. P. Hodges for plaintiff,

Insisted, that to the performing of the services, for which a recovery is sought, the assent of the defendant most clearly appears; and the court have but to sustain the doctrine laid down in the 17th Vt.

From the report, circumstances appear which fully justified the plaintiff in presuming that he was in the employment of the defendant, and these circumstances were within the knowledge of the defendant, and it was incumbent upon the defendant to have rebutted the presumption of his assent in some manner, either by word or deed, if he desired to throw off his liability.

The case shows, that the *credit* was given *exclusively* to the defendant, in good faith.

The opinion of the court was delivered by

Swain v. Tyler.

REDFIELD, Ch. J. The only question here is, whether the plaintiff can recover for medical attendance upon defendant's minor son, who was at the time at his house sick, the defendant having given him leave to act for himself, and having made publication of the fact, and that he would not thereafter pay any debts of the son. The report states that the plaintiff's charges were for necessary services rendered the son upon the credit of the defendant, and in good faith charged to him at the time. The father knew of the services being rendered, and made no objection, but did not, as the auditor says, assent to their being done on his credit, either expressly or impliedly, in fact.

Under these circumstances the only question is, whether the law implies a promise to pay—we think it does, on the general ground, that while one's minor children remain a part of his family and household, and receive necessities, with the knowledge of the father and without objection, on his part, it is the same thing as if he received them himself, or his wife received them. There was nothing in the case known to plaintiff, to raise any doubt of the defendant's being bound to pay, and expecting to pay, as there is when the patient is not a child, or is of age. In such cases the father is not expected, as a matter of course, where he makes no objection, to assent to the services. He may intend to pay, or he may not. If the father, for any reason had taken it into his head, that he would not have the plaintiff attend upon his son, or not upon his credit, and the plaintiff had persisted, or had performed the services upon the credit of the son, and then attempted to charge the father, the case might merit a different consideration; but here it seems to us nothing exists to raise a doubt, that the plaintiff was fairly justified in performing the services, on the credit of defendant, and in supposing the defendant so understood the matter at the time. The County Court seemed to have so viewed the matter, and this judgment is affirmed.

Wires & Peck v. Nelson et al.

WIRES & PECK v. CHARLES L. NELSON, R. BATCHELDER,
A. WATERS AND L. J. GIBSON.

Ejectment. Mortgagor and Mortgagees. A subsequent Mortgagee in certain cases can recover rents and profits. Disclaimer.

The mortgagor is regarded in this State, after the law day, as a *quasi* tenant to his mortgagee, and if he execute two or more successive mortgages to different persons, he is as much estopped to deny the title of the subordinate mortgagees, as of the first; and his deed estops him from setting up an outstanding title in a stranger, or of defending himself by means of that title, until he has first *bona fide* surrendered the possession.

It is the duty of the mortgagor to surrender to either mortgagee, on notice, and if he do not, he thereby becomes a wrong doer, and liable to pay rents and profits, to some one of the mortgagees.

The mortgagee may recover rents and profits, by way of damages, in ejectment, either against the mortgagor, or any one in possession, claiming title under him; and when the prior mortgagee gives no notice, the subsequent mortgagee may recover rents and profits from the service of his writ, or notice.

And where the mortgagor and his tenants hold in severalty, the mortgagee may recover a joint judgment against the tenants and mortgagor, in possession of still another portion, for the rents and profits of the whole, if the tenants who hold in severalty do not separate in their defence, by a disclaimer.

EJECTMENT for certain premises in Burlington. Plea, the general issue, and trial by the court.

On trial it appeared that the premises in question was a building in Church Street, in Burlington, the lower story of which was divided into two shops or stores fronting upon the street, and that the defendants, Nelson, Waters and Gibson only occupied one of these shops under lease from defendant, Batchelder.

It also appeared, that said Batchelder and one Beach, mortgaged the premises described in the declaration to the plaintiffs, by deed of August 5, 1850, with full covenants of warranty and against incumbrances; the said deed was recorded August 10, 1850. The mortgage was given to secure a bond executed by the said Batchelder and Beach, under date of April 15, 1850, to the plaintiffs in the penal sum of two thousand dollars, to indemnify them for signing and endorsing notes for said Batchelder. That before the giving of the notice hereinafter mentioned, said Batchelder and Beach became indebted to the plaintiffs under said bond and mortgage,

Wires & Peck v. Nelson et al.

in not less than two thousand dollars, for notes which the plaintiffs had endorsed and signed for said Batchelder, and been compelled to pay and take up with the knowledge of said Batchelder and Beach before the notice, and that no part of said indebtedness has been paid to them. Beach left the premises before giving the notice, and that Batchelder has remained in possession since the mortgage, and by his deed of March 27, 1852, executed and acknowledged in common form he leased to said Nelson a part of the premises for a term of two years from April 1, 1852, at a specified rent; that since the lease Batchelder has been in possession of all the premises, except what he leased to said Nelson. That at the last mentioned date, said Nelson sublet the portion of the premises leased of said Batchelder to said Waters, and the same day said Waters sublet to said Gibson a portion of what was leased to him by said Nelson; and Waters and Gibson have under their several leases been in possession since the leases were executed to them, paying rent from time to time, before and since the giving of said notice, upon the respective leases to them.

That on the 19th day of August, 1852, the plaintiffs notified the defendants that they were mortgagees of the premises, and that the condition of their mortgage had been broken, and requested them to surrender to them, the plaintiffs, the premises forthwith. That the defendants refusing to surrender, the plaintiffs afterwards brought this suit, and claim to recover seizen and possession of the premises, also the rents and profits thereof since said notice.

It also appeared, that prior to the execution of the mortgage to the plaintiffs, said Batchelder executed a mortgage of the premises to one T. R. Fletcher, and one to B. Tousley, to secure debts due them respectively, which are outstanding; and the condition of each of the two mortgages last mentioned, was broken when said notice was given. That the amount of the Fletcher mortgage is not less than \$1400, and that of Tousley not less than \$500; and neither Fletcher or Tousley or any one under either of them has notified or required either of the defendants to pay to him, or account to him for the rents or profits of the premises, or to surrender possession thereof, nor has either of the defendants attorned to said Fletcher or Tousley or either of them.

The defendants claimed that the plaintiffs were not entitled to

Wires & Peck v. Nelson et al.

recover rents and profits; and that if so entitled the judgment for possession against Nelson, Waters and Gibson, should only be for the portion of the premises so occupied by them as aforesaid, and for the rents of that portion of the premises only.

The County Court, March Term, 1858—PECK, J., presiding—rendered judgment for the plaintiffs against all the defendants jointly for the whole premises, and the rents and profits of the whole from the giving of notice by the plaintiffs till the time of trial.

To this decision the defendants excepted.

Phelps & Whittenden for defendants.

I. The plaintiffs being third mortgagees, and both the previous mortgages being outstanding and absolute, are not entitled to recover rents and profits. It is universally held, except in Vermont, that even the first mortgagee is not entitled to rents or *mesne* profits, until entry or judgment of foreclosure. 15 Mass. 268. 1 Pick. 87. 19 Pick. 525. 25 Pick. 841. 6 Barbour, 138. 8 Pick. 459. 5 Carr. 556. 1 Eng. Law & Equity, 460. 2 Eng. Law & Equity, 342. And such is clearly the result of the general principles applicable.

In this State, a different rule has been applied in favor of the first mortgagee, against the assignees of the mortgagor; but has never been, and certainly never ought to be extended to them. *Atherton v. Bank*, 1 Ohio 329. And in the case of *Collins v. Gibson et al.*, 5 Vt. 243, it was held that a second mortgagee under these circumstances could not recover rents.

In the case of *Cutlin v. Ferris et al.*, tried before Judge BENNETT, in Franklin County, the same decision was made and acquiesced in by Mr. Smalley for the plaintiff.

The recovery of rents and profits in ejectment, takes the place in this State of the action of trespass for *mesne* profits, which is an equitable action and subject to equitable defence. *Murray v. Gouveneur*, 2 Johns. Ca. 438.

II. If the lessees are liable for rents at all, it is only in respect of the portion of the premises which they occupied. The plea of the general issue, puts the plaintiff upon proof of defendant's possession.

Wires & Peck v. Nelson et al.

Stevens v. Griffith et al., 3 Vt. 448. And for the purposes of this question no disclaimer was necessary.

The lessees are liable, if at all, not as trespassers for damages, but as tenants for rent, due the plaintiffs under their notice to that effect. If they could even be regarded as trespassers, the notice was a waiver and affirmed and authorized their tenancy.

The disclaimer is a statute plea, for a special purpose having no similar effect at common law, and applies to the question of title, not that of rent.

W. W. Peck and Underwood & Hard for plaintiffs.

The mortgagor and those who claim under him are estopped by the covenants in the deed, from setting up an older title in a prior mortgage.

The defendant, Batchelder, deeded the premises in question to the plaintiffs, and covenanted that they were free and clear of all incumbrance, and the other defendants hold by a lease from Batchelder executed subsequently; and they cannot set up a prior incumbrance to defeat the plaintiff's title.

The defendants plead jointly not guilty, and none of them made any disclaimer, and the judgment against them all jointly was proper. *Marshall v. Wood*, 5 Vt. 250.

When there is a prior mortgage, any subsequent mortgagee may enjoy the security till the prior creditor claims it. *Otherwise*, they would be lost to both creditors. *Stanbury v. Dean*, Brayt. 166. *Atkinson v. Burt et al.*, 1 Aik. 329. *Babcock v. Kennedy*, 1 Vt. 457. *Lyman v. Mower et al.*, 6 Vt. 345.

The opinion of the court was delivered by

REDFIELD, Ch. J. This is an action of ejectment in favor of a subsequent mortgagee, against the mortgagor and his tenants of a portion of the premises in severalty. The mortgagor is regarded in this State, after the law day, as a *quasi* tenant to his mortgagee, and we are not aware, that it has ever been doubted, that if he executes two, or more successive mortgages, to different persons, he is as much estopped to deny the title of the subordinate mortgagees, as of the first. His deed stops him from denying the title of either, or setting up an outstanding title in a stranger, or of defending himself by means of that title, until he has first *bona fide*

Wires & Peck v. Nelson et al.

surrendered the possession. *Reed, Admr. v. Shepley*, 6 Vt. 602. *Grano v. Munson*, 9 Vt. 37.

This question has long been considered as settled in this State. There is, in fact, no such title in the first mortgagee, as to defeat the subsequent one's right of recovery in ejectment, against the mortgagor, and his tenants, and if there was, the mortgagor is estopped from setting it up against his own mortgagee. It is the duty of the mortgagor to surrender to either, on notice, and if he do not, he thereby becomes a wrong doer, and liable to pay rents and profits, to some one of the mortgagees upon general principles.

II. A question is made here, whether the rents and profits can be recovered, by a subordinate mortgagee. Upon principle it would seem, that it should be so. His title is good against the mortgagor, his assignee, or tenants. And aside from the question of the prior mortgages, it has been held, that he may recover *mesne* profits of the assignee of the mortgagor. *Atkinson v. Burt et al.*, 1 Aikens, 329; also against his tenants. *Babcock v. Kennedy*, 1 Vt. 457. This must be the same, as a recovery against the mortgagor himself. And accordingly it has been regarded as settled, since the case in Aikens' R., that the mortgagee may recover rents and profits, by way of damages in ejectment, either against the mortgagor, or any one in possession, claiming title under him. And we think upon general principles, the right to recover the premises and hold the use, which seems to be accorded to the subordinate mortgagee, involves virtually the right to recover rents and profits, from the time notice is given to the mortgagor. It would be very unreasonable if it were not so, since confessedly the subordinate mortgagee is ordinarily, the only one in interest in the question. The prior mortgagees, not moving, are presumed to be fully secured, and to have no interest in securing the rents. The last mortgagee, whether he intend to redeem or not, is then the only one in interest in the rents. It is admitted on all hands, that the mortgagor has no right to withhold them from the mortgagees. If no suit is brought, or notice given by the prior mortgagees to the mortgagor to pay rents to them, as in this case, it is certain *they* cannot recover them, and if a recovery is denied to the plaintiff here, the mortgagor retains them himself, in spite of the only one interested to recover them. And if the first mortgagee takes them at any time to himself, that is the same thing to the last mortgagee, as if he

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had them himself, since they are thus made to go to reduce the burden upon the land, and virtually to enure to the ultimate benefit of all the mortgagees. But if the prior mortgagee, make no such claim, then, if the last mortgagee brings suit, and is entitled to recover, in ejectment, he must by the statute recover rents and profits, unless in some way they are secured to another, or are held as in *Collins v. Gibson*, 5 Vt. 248. That was the only ground upon which the recovery was denied them. But in that case the second suit was brought after the first mortgagee had recovered a judgment, and within one month of the time of the expiration of the time of redemption, and the court very properly held, that the right to *mens* profits was secured to the first mortgagee, from the time of bringing his suit, which we are not inclined to question. And perhaps even notice to the mortgagor to pay rents would have the same effect. But when no notice is given, as in the present case, we think the subsequent mortgagee may recover rents and profits, from the service of his writ, or notice. But whether if the first mortgagee waives his claim for rents and profits, the subsequent mortgagee, having given notice for the same time, may not recover them, it is not necessary to decide. After the judgment, and while the time of redemption was running, clearly, the first mortgagee might have enforced his right to rents and profits, which was really the only question decided by the court, in that case.

III. But it is claimed he cannot in a case where the tenants of the mortgagor hold in severalty, recover a joint judgment against them and the mortgagor, in possession of still another portion for the rents and profits of the whole. This may not be strictly just. But since the statute provides in express terms for tenants who hold in severalty to separate in their defence, by a disclaimer, and thus compel the plaintiff to take separate judgments against them, it has been held, that when they omit to sever in this mode, they must stand or fall together.

Judgment affirmed.

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FARMERS AND MECHANICS' BANK v. HENRY RATHBONE.

[Decided in 1852.]

Bills of Exchange. Liability of acceptor. Effect of the release of the drawer. Rule in Equity.

If a bill of exchange be drawn and accepted at a time when the drawer has an open account with the acceptor, for goods which he is in the course of sending to the acceptor for sale, and it appear to have been the understanding of the parties, at the time, that the bill was to be paid by the acceptor, and its amount be entered in the general account, it will be treated as a bill drawn for value, imposing upon the acceptor the primary obligation to pay it, and cannot be held an accommodation bill; and its legal character, in this respect, will not be affected by any alteration of the balance of the account, nor by the fact, afterwards ascertained, that the drawer was indebted to the acceptor at the time of the acceptance.

The release of the drawer, in such case, by the holder, will not discharge the acceptor, but will be treated as a relinquishment, merely, by the holder, of so much security, which he had for the payment of the debt.

An endorsee, for value, of a bill of exchange, who became such before its maturity, and in ignorance that it was given for accommodation, has a right to treat all parties thereon, as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and this right is unaffected by any subsequently acquired knowledge, that the bill was given for accommodation. In such case a release of the drawer, by the holder, has no effect on the ultimate liability of the acceptor.

And in this respect the rule is the same in equity as at law.

ASSUMPSIT on two bills of exchange for \$600 each. The declaration contained two counts, the first count was as follows:

"The defendant is attached to answer to the plaintiffs in a plea
 "of the case for that one Caleb E. Barton heretofore, to wit, on
 "the fifth day of October, A. D. 1844, at Charlotte, in said county
 "of Chittenden, according to the custom and usage of merchants
 "from time immemorial, used and approved of within this State,
 "made his certain bill of exchange in writing, bearing date the
 "day and year last aforesaid, and directed the said bill of exchange
 "to the said defendant, at number thirty-five, Water Street, New
 "York, and thereby, then and there requested the said defendant
 "thirty days after the date thereof, to pay to the order of one Sam-

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"uel H. Barnes, the sum of six hundred dollars, for value received, and then and there delivered said bill of exchange to the said Samuel H. Barnes, which said bill of exchange the said defendant afterwards, to [wit, on the day and year last aforesaid, upon sight thereof accepted according to the usage and custom of merchants. And the said Barnes to whose order the payment of the said sum of money in said bill of exchange specified was to be made, after the making of said bill of exchange, and before the payment of said sum of money, to wit, on the day and year aforesaid, at the place last aforesaid, according to the said custom and usage of merchants, endorsed said bill of exchange, and then and there ordered and appointed the said sum of money in the same specified to be paid to the said plaintiffs, and then and there delivered the said bill of exchange so endorsed as aforesaid to the said plaintiffs, and the said plaintiffs aver that afterwards and when said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the seventh day of November, A. D. 1844, to wit, at number thirty-five, Water Street, in the city of New York, in the State of New York, one of the United States of America, that is to say, at Charlotte, aforesaid, the said bill of exchange was duly presented and shown for payment thereof to a clerk in the store of the acceptor, according to the said custom and usage of merchants, and payment of the said sum of money in said bill of exchange specified, was then and there duly required, but that neither the said defendant nor any person or persons on behalf of said defendant, did or would when the said bill of exchange was so presented and shown for payment thereof, as aforesaid, or at any time before or afterwards pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, of all which said premises said defendant afterwards, to wit, on the day and year last aforesaid, had notice, by means whereof according to said usage of merchants, he, the said defendant, then and there became liable to pay to said plaintiffs said sum of money in said bill of exchange mentioned, when he should be thereunto afterwards requested; and being so liable, he, the said defendant, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at the place aforesaid undertook and then and there faithfully promised the plaintiffs to

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"pay them the said sum of money, in said bill of exchange specified, when he should be thereunto afterwards requested."

The second count was for another bill of exchange for a like sum, of which the following is a copy:

"\$600

CHARLOTTE, Vt. 25th Oct. 1844.

"Thirty days after date please pay to the order of Samuel H. Barnes, six hundred dollars value received and charge to account
"of Yours, &c.

CALEB E. BARTON,
Charlotte, Vt.

"To Mr. Henry Rathbone,
"35 Water Street, New York." }

And endorsed by the said Barnes, and accepted by the defendant.

The case was tried March Term, 1852—PIERPOINT, J., presiding. Plea, the general issue and trial by the court.

On the trial, the plaintiffs proved the drawing and endorsing of the bills declared upon, and their acceptance by defendant as averred, and that they were regularly discounted by them before their maturity; that the same were duly protested for non-payment, and due notice given to charge the drawer and endorser. It appeared that no payments had been made upon them other than what appear in statement, marked "B," which was as follows:

Draft due Nov. 7, 1844,	\$600
Protest, &c.,	1 75
Interest to July 10, 1846,	70 52
Draft due Nov. 27, 1844,	600
Expense,	1 75
Interest to July 10, 1846,	68 19
	<hr/>
	\$1842 21
July 10, 1846, Cash,	612
	<hr/>
	\$780 21
Interest to March 17, 1848,	86 28
	<hr/>
	\$816 49
March 17, 1848, Cash,	500
	<hr/>
	\$316 49

It appeared from the depositions, of one Ferguson, and Curtis Rathbone, introduced by defendant, that prior, and up to the acceptance of the drafts, Barton, the drawer, being in Charlotte, in this State, had been in the habit of consigning cheese to the defendant at

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New York, for sale on commission and of drawing on the defendant for the proceeds, and that the latter was in the habit of accepting the drafts. That the bills in suit were so drawn and accepted, the defendant believing, when the last mentioned bills were accepted, he had enough of Barton's property to meet them; but that at their maturity, Barton was indebted to defendant on account apart from the bills in suit, and the latter had no property or funds in his hands of the former wherewith to meet them.

That the bills in suit are those charged October 11th and 30th, 1844, in the defendant's account appended to the deposition of Ferguson, and were respectively accepted at those dates, and were charged over to Barton in the same manner in which the other acceptances were in the said account. The defendant also introduced in evidence the following instrument:

"In consideration of five hundred dollars, to the Farmers and Mechanics' Bank, paid by Caleb E. Barton, of Charlotte, the said bank hereby wholly release and discharge the said Barton from all liability or indebtedness to said bank, which said bank have or may claim to have for, or on account of, any and all notes, checks, drafts or bills of exchange or acceptances to which Henry Rathbone is in any wise a party, either as maker, drawer, endorser, or acceptor, or payee, or drawee, and also from all liability on any paper which has been sued against said Barton, in favor of said bank or any other paper said bank may have against Barton, previous to the 17th of March instant, which said Rathbone was or is any wise a party to.

"In witness whereof we have hereunto affixed the seal of said Bank, at Burlington, this 30th day of March, A. D. 1848.

(Signed,) "FARMERS AND MECHANICS' BANK. [L. S.]

"By John Peck, Pres't."

The defendant also proved, that plaintiff's cashier impressed their seal thereon, and subsequently delivered the instrument to Barton's attorney, and that the plaintiffs were then as much in the habit of sealing instruments by impressing their seal upon the paper, as by sealing in any other way.

That July 10th, 1846, Barton paid plaintiffs the six hundred and twelve dollars entered in the the above statement "B," when they discharged a mortgage, which they held against him as drawer; and that he supposed he was thereby discharged from any further lia-

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bility on the bills: but that the plaintiffs understood that he was not. Afterwards plaintiffs sued Barton, as drawer, and after suit and on March 17, 1848, rather than stand trial he paid five hundred dollars on the bills, the same entered in statement B, with the understanding that he was to be discharged as drawer; but there was no other agreement to discharge him, than what appears in said instrument, which was executed in pursuance of such understanding, and in consequence of the last payment, which sum last paid is the same mentioned in said instrument.

That on making said payment, the suit against him was withdrawn. The signature to the instrument was admitted to be that of John Peck's, then president of plaintiffs. The defendant also introduced the affidavit of his attorney, Ashbel Peck, filed in the cause, on a motion for continuance, March 25, 1847, in which affidavit Mr. Peck testified that he "made arrangements with the defendant, to take the testimony of his book keeper in New York, (defendant's brother,) to show that the drafts in suit are accommodation drafts, as between defendant and the drawer, Caleb E. Barton, and that defendant had over paid said Barton, exclusive of the drafts in suit, and that defendant was to go to New York, and expected to go in a few days, and write me the time and place and person before whom he would take the testimony. I was then to give notice to plaintiffs, and have the testimony taken in season for this term, &c." But there was no proof, that the plaintiffs previous to the execution of the release to Barton, had notice of the contents of the affidavit, except so far as it was known to their prosecuting attorneys in this suit, to whom the same was actually known at the time of its filing.

It appeared that the plaintiff's discounted the bills to Barton, under his representations and in the belief that they were drawn on cheese consigned to the defendant, and supposed that the defendant had in his hands property or funds of Barton sufficient to meet them when they were discounted and accepted; and that plaintiffs never had any knowledge to the contrary, except so far as they were informed of the same by said affidavit and by the appearing at the taking of said depositions. It also appeared that there was no evidence tending to show that the defendant had any knowledge of, or consented to, the release of Barton previous to its execution.

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The plaintiffs claimed judgment for the balance of said bills unpaid, upon these facts and the evidence referred to. The County Court rendered judgment for the defendant.

Exceptions by plaintiffs.

Salmon Wires and W. W. Peck for plaintiffs.

1. Assuming that as between the plaintiffs and defendant, the latter is to be regarded as the surety of Barton, nothing has transpired between the plaintiffs and Barton, the effect of which has been to discharge the defendant.

The discharge of the mortgage on the payment by Barton, July 10, 1846, of \$612, did not have that effect, both because plaintiffs were then ignorant that defendant had endorsed for accommodation; and because, if they were not thus ignorant, the burden would rest upon defendant to show that the security was discharged either without receiving anything upon the debt, or an amount less than the value of the security. The creditor having relinquished it upon receiving part payment, it will be presumed that he received an amount equal to the value of the security.

Again: Barton was not discharged by the instrument of March 30, 1848, which was executed in consideration of the payment of \$500, March 17, 1848.

The instrument is not in its form of execution a release being unsealed. *Warner v. Lynch*, 5 Johns. 164. *Bank of Rochester v. Gray*, 2 Hill, 227. *Farmers and Mechanics' Bank v. Haight et al.*, 3 Hill 493. The instrument is therefore merely a paid instrument.

2. If, however, Barton has been discharged, the plaintiffs knowing at the time, that defendant was an accommodation acceptor, the latter was not thereby discharged.

As to a holder for value and in good faith the bill taken according to its legal import is the only evidence of the relation of the parties to it, so far as their relation depends upon the bill, extrinsic evidence, tending to modify these, is inconsistent and inadmissible. The acceptance admits that the drawer has funds in the hands of the acceptor, which the latter is bound to pay under his direction. It is equivalent to a declaration to the holder, that he is the principal debtor, and is to be so treated. The discharge of an intermediate party could not operate to discharge the acceptor,

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as an accommodation acceptor, without allowing extrinsic matter to reverse the relations indicated by the instrument. *English v. Daryl*, 2 Bos. & Puller. *Claridge v. Dalton*, 4 M. & S. 226. *Walleit v. Thompson*, 5 Esp. 178. These cases sustain the position of the plaintiffs. 4/

But in *Laxton v. Peat*, 2 Camp. 185, an accommodation acceptor was held to be discharged by the discharge of the drawer, for whom the acceptance was furnished; the holder knew the fact of the accommodation, when he took the bill. This case is an opposing case, provided there is no distinction between a case where the holder has accommodation when he takes the bill, and where he has not such knowledge until afterwards and prior to the discharge. This case has been rejected by all the subsequent English authorities, 3 Camp. 281. 4 Taunt. 730. *Kennison v. Cork*, 3 Camp. 362. *Fentum v. Pocock*, 5 Taunt. 191. 1 Barn. & Adolp. 703. 3 Barn. & Adolp. 41 and 36. Thompson on Bills, cited in Story on Notes, page 524, (note 1.)

The law as claimed by the plaintiffs has been uniformly recognized in the United States. *In re Babcock*, 3 Story, 893. *Church v. Barlow*, 9 Pick. 547. *Commercial Bank v. Cunningham*, 24 Pick. 270. *Bank of Montgomery v. Walker*, 9 S. & R. 229. 1 U. S. Digest, 429, note 289. 4 U. S. Digest, 292, note 97. Story on Notes, 524 note 1. 7 U. S. Digest 412, note 47.

The effect of the discharge of Barton upon the liability of defendant must be determined by the law of New York, the contract of acceptance having been made there. Story on Bills, § 158, 164, 265.

By the law of that State, defendant was not discharged by the discharge of Barton. *Trimball v. Thorn*, 16 Johns. 152. *Wood v. Jefferson County Bank*, 9 Cowen 194. *Brown v. Mott*, 7 Johns. 361. *Seabury v. Hungerford*, 2 Hill, 80. *Murray v. Judah*, 6 Cowen, 484. 3 Kent's Com. 86 and note A.

If defendant was discharged, he should have plead the matter as *puis darrein continuance*.

The general issue admits only of matters of defence existing at the time of its being pleaded. In the present case the general issue must be treated as having been plead as early as March Term, 1847. And the discharge was not granted until afterwards. Gould on PL. chapt. 6, § 46, 49, 122, 124.

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If defendant was entitled to prove the discharge, it could operate only as a satisfaction of the damages after suit, and the plaintiffs were entitled to a nominal judgment.

A. Peck and G. F. Bailey for defendant.

The case shows, that Barton, the drawer, for whom plaintiffs discounted the bill, was released by the plaintiffs. The release is operative to discharge Barton.

The case also shows, that the defendant was an accommodation acceptor, or that he had no funds of Barton's in his hands, and that it was the duty of Barton to pay the bills in suit, and that this was known to the plaintiffs prior to, and at the time of, the execution of the release, and that defendant was defending this suit upon this ground, in connection with a previous release to Barton, by the plaintiffs. 1. Notice to the attorney of the plaintiffs in this suit of the filing of the affidavit of the defendant's attorney, and its contents more than a year before the execution of the release was notice to the plaintiffs. 2. The appearance of the plaintiffs at the taking of the depositions, which disclosed all the facts was also notice to the plaintiffs. 3. The case shows, that the court on the evidence decided for defendant. The above evidence tends to show *actual notice* to the Bank, and the court must presume the court below found *actual notice* to the Bank. Every fact necessary to sustain the judgment below, which there was any evidence tending to prove, must be taken to have been found by the court below. *Ashley v. Nailie*, 2 Vesey 367. 2 Lead. Cases in Equity, Part 1, 122, 139.

The release to Barton, the drawer, after notice that the defendant was an accommodation acceptor, discharged the defendant from all liability upon the drafts. The general principle cannot be denied, that a discharge of a principal on a promissory note, or an agreement with him for an extension of time founded upon a good consideration, by the holder who is acquainted with the true relation of the parties to the instrument, at the time he takes it, operates as a discharge of the surety. The rule of liability as respects an accommodation acceptor, when the drawer is discharged by the holder, is the same as that of the surety upon a promissory note; in case of a discharge of the principal, or an agreement with them for an extension of time. An accommodation acceptor is but

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a surety, and is entitled to the same rights and privileges as a surety on a promissory note. The actual relation of the parties may be inquired into and proved by parol; it is not the apparent but the actual relation that governs, when the holder has notice of the actual relation at the time he executes the discharge. Such evidence is not to vary the written contract, but relates to a matter collateral to the contract, and is to enable the court to determine what effect is to be given to the new agreement by the plaintiff, without the consent of the surety. 2 Greenleaf's Ev. 165, § 201. *Grafton Bank v. Hunt*, 4 N. H. 221. *Harris v. Brooks*, 21 Pick. 195. *Carpenter v. King*, 9 Met. 511. *Pitkin v. Flanagan*, 23 Vt. 160. *Adams v. Gregg*, 3 Com. Law 461. *Sergeant v. Appleton*, 6 Mass. 85. *Espartero, Glendenning*, 1 B. & P. 517. *Laxton v. Peat*, 2 Camp. 185. uek

The rule of law is the same, whether the holder knows the true relation of the parties at the time he takes the instrument, or is advised of it afterwards. The reason of the rule is founded in the principle that a discharge of the principal, on an agreement with him for an extension of time is in violation of the rights of the surety, whether the holder knows the true relation when he takes the instrument, or this fact comes to his knowledge afterwards. *Wheat v. Kendall*, 6 N. H. 504. *Branch Bank v. James*, 9 Alabama 469.

It is true that a *bona fide* endorser for value of an accommodation bill or note made for the purpose of negotiation, may hold the parties according to their relation apparent upon the instrument, even if taken with notice that the parties stand in a different relation, so long as he makes no new agreement; but if such holder makes an agreement with one apparently principal, but known at the time to be but surety, such holder is bound by the actual relation of the parties and thereby discharges the surety, and it makes no difference at what time the knowledge comes to the holder, provided it is before he makes the agreement. There is no distinction in principle between an accommodation acceptance and any other case where the surety is upon the instrument apparently principal.

The opinion of the court was delivered by

ISHAM, J. This action is brought on two bills of exchange,

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drawn by Caleb E. Barton on the defendant, Henry Rathbone, of the city of New York; both of which were duly accepted, and before maturity, were discounted, and transferred by endorsement, to the plaintiffs. When the bills matured, they were dishonored, duly protested, and notice thereof given to the drawer.

On the trial of the case, at the circuit, the defendant insisted, that the bills were accommodation bills; and, upon the facts stated in the bill of exceptions, he now insists, that the bills are of that character, that the drawer is the person primarily liable, that the acceptor stands as his surety, and that the release of the drawer, by the plaintiffs, operates as a discharge of the defendant, as acceptor. It is admitted, that if these bills are not accommodation bills, but are really bills for value, the release will not affect the liability of the acceptor. It will discharge all persons intermediate between the holders and drawer, but not those prior on the bills, nor those on whom rests a primary or absolute liability to pay them. *English v. Duff*, 2 B. & P. 61. BAILLEY, J., in *Claridge v. Dalton*, 4 M. & S. 226. Chit. on Bills, 451.

We are not satisfied that these bills are to be treated as accommodation papers. It is true the fact is found in the case, "that at the maturity of the bills, the drawer was indebted to the acceptor on account, apart from the bills in suit, and that the latter had no funds in his hands of the former, wherewith to meet them." But, in connection with this statement, it equally appears from the exceptions, that during the season of 1844, the drawer, at different times, consigned to the defendant as commission merchant, for sale on his account, a quantity of cheese, the gross proceeds of which amounted to \$7848 78; and from the statement in the account of sales we perceive, that a much larger amount than the sum of these bills, was realized therefrom, after these acceptances were given. The account arising from the sale of this property commenced in July, 1844, and closed in November of that year. There has been no statement of that account rendered, or balance ascertained by the parties. As between them, the whole account remains open and subject to their future liquidation. While this account was accruing, these bills were drawn and accepted, obviously and with the understanding, that they were to be paid by the defendant, and the amount so paid be entered into their general account.

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During that period, they doubtless anticipated, that the balance would be sufficient to pay these bills, and have been respectively disappointed in the amount finally realized therefrom ; so that there is now a balance due the acceptor, as stated in the account of sales. But as these bills, at first, were drawn upon property consigned to the acceptor, and he accepted them with the same means of knowledge, which the drawer had, and thereby assumed the primary obligation to pay them, there is no propriety in treating the bills otherwise than as creating obligations of that character, after they have passed, in due course of business, into the hands of an endorsee. In so treating them, we are manifestly carrying into effect the mutual intention of the parties when the bills were drawn and accepted ; for it is distinctly stated in the case that both the drawer and the drawee supposed and believed, that there were funds sufficient in the hands of the drawee to pay them at maturity, and under that belief the drawer made such representations to the plaintiffs, at the time of their endorsement and discount.

The legal effect and character of bills of exchange, so drawn and accepted, is not changed, or affected, by any alteration of the balance of the account, nor even by the fact if it should be afterwards ascertained, that there was an indebtedness, at the time of the acceptance, from the drawer to the acceptor. This principle is fully illustrated by the case of *Bagnall v. Andrews*, 7 Bing. 217. Indeed, the facts in that case, and the principles there established, have such a direct application to this case, that we cannot consider these bills otherwise than as bills for value, without entirely disregarding the authority and principles of that decision. In that case when the bill was drawn, the drawer had an open account with the acceptor, for goods which he was in the course of sending to him for sale ; neither of them at that time knew the state of the account ; "*and it afterwards turned out, that the drawer was, at the time of the acceptance, indebted to the acceptor, instead of the acceptor being indebted to the drawer.*" Before the bill became due, the drawer became bankrupt and endorsed the bill to the plaintiff, who was ignorant, that an act of bankruptcy had been committed. The drawer being called as a witness, was objected to as being interested, on the ground that this was an accommodation bill, and that if the plaintiff recovered, he would be responsible to the defendant, not only for the amount of the bill, but for the costs of

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that suit. TINDALL, Ch. J., after remarking that such consequences would follow, if this was an accommodation bill, and that the witness would be incompetent, observed, that "we think, upon the facts in the case, the bill was not an accommodation bill. At the time it was drawn, the drawer had an open account with the defendant for goods sent, and which he was then in the course of sending to him for sale. The drawer might, at that time, reasonably expect, that the acceptor would pay the bill out of funds that might be in his hands, when the bill arrived at maturity; for the evidence is express, that, at the time the bill was drawn, neither the drawer, or acceptor, knew the state of the account. A bill so drawn and accepted cannot be treated as an accommodation bill, nor, consequently, is there any implied obligation, on the part of the drawer, to indemnify the acceptor against the costs of any action which may be brought against him." 1 Phil. Ev. 61. 9 S. & R. 237.

If that case is to be treated as sound in principle, it makes a final disposition of the case under consideration; for under that authority, these bills cannot be considered as accommodation bills, but must be treated as bills for value; the acceptor being the party primarily liable and the drawer considered only as his surety, or guarantor. In such case it was properly remarked, that the release of the drawer was a relinquishment merely of so much security, which the plaintiffs had for the payment of the debt, and which in no event can affect the liability of the acceptor.

It is very evident, also, that the plaintiffs could have sustained no action against the drawer of these bills, unless they had been duly protested and notice given. This principle is founded on the consideration, that a primary liability for their payment rests only upon the acceptor; while that of the drawer is contingent and collateral, and arises upon the default of the acceptor. The necessity of protest and notice, in such cases, is not avoided by a fluctuating balance in their accounts, nor even by the fact, where there exists an open account, that there is an indebtedness from the drawer to the acceptor. *Orr v. Megennis*, 7 East. 359. *Blackburn v. Doren*, 2 Camp. 503. *In re Brown*, 2 Story's C. C. 521. Story on Bills, § 311. 2 Smith's Lead. Cas. 29. Smith's Merc. Law, 315. 15 Pet. 393.

But if these bills are to be regarded strictly as accommodation

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bills, the same result, we think, must follow. In such case, it is insisted, that the drawer is the person primarily liable; that the acceptor is to be treated as his surety, and that the holder of the bills, is bound so to regard and deal with them, notwithstanding the terms of the bill, whenever he has notice, that the acceptance was for accommodation; whether that notice was received at the time he took the bills, or at any subsequent period.

It is proper to observe, that this question does not now arise between the drawer and acceptor; as between them, the consideration may be inquired into and the true relation of the parties shown; but the question is presented in a case between the acceptor and an endorsee for value, without notice, that the bill was for accommodation, at the time he became the holder. When these bills were received by the plaintiffs, they were invested with those legal rights, and became subject only to those duties, that arose from what appeared on the face of the bills. Their legal effect and the relative liability of the drawer and acceptor could not be changed or altered by any fact not then appearing.

These principles have a peculiar application to bills of exchange, as they are designed for commercial purposes; and their application is required to impart to them that credit and currency, which is necessary to insure the purposes, for which they were intended. At the time the plaintiffs became endorsees, they had the right, on the one hand, and were bound, on the other, both at law and in equity, to regard the acceptor as primarily liable, and the drawer as his surety; they could have released, compounded with, or given time to the drawer, without in any way affecting their right to hold the ultimate liability of the acceptor. Story on Bills § 429, 430. 15 Pet. 393. 1 M. & W. 374. Such being their right at the time they became the holders of the bills, there is no propriety or authority in saying, that that right can be subsequently changed, or affected, by a mere notice from the acceptor to the holder, that the drawer had neglected to provide funds for the payment of the bills; or by any act of the drawer and acceptor, to which the plaintiffs were not a party, and to which they have never given their assent. Theob. on Pr. & Sur. 216.

The plaintiffs, as holders of these bills, were not subject to any of the equities existing between the original parties, and without their assent those equities cannot be imposed upon them. The case

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of *Mallet v. Thompson*, 5 Esp. 178, was an action by an endorsee against the maker of an accommodation note for the payee. The holder received part payment, under a composition, from the payee, and covenanted not to sue him, which is a virtual release, knowing when he received the bill, that it was given for accommodation. Lord ELLENBOROUGH ruled, that the maker was liable, notwithstanding the payment and release; for his liability on the face of the note was primary and principal, and that of the endorsers was collateral and secondary; and whatever may be their liabilities between themselves, such was their liability to the holder. It was also held, that the release would have no effect between the maker and payee; for whatever the maker was compelled to pay he might call upon the payee to repay; the release in no way disturbed their relations. On the application of the same rule to this case, whatever the acceptor may be compelled to pay, he can call upon the drawer to repay, notwithstanding the release; for their relations are not disturbed by its execution. It is evident, also, in this case, from the release itself, that a discharge of the bill was not intended by the parties, but simply a release of the drawer, by the holders, from any farther claim which they had personally on him, leaving the holders to pursue their remedy against the acceptor, as the party primarily liable. Story on Pr. Notes, § 423.

In the case of *Laxton v. Peat*, 2 Camp. 185, and *Collet v. Haights*, 3 Camp. 281, a different doctrine was applied to accommodation bills, where the holder, at the time he received the bills, knew that they were for the accommodation of the drawer. Lord ELLENBOROUGH remarked, "that as it was an accommodation bill, of which all parties had notice, the acceptor can only be considered as a surety for the drawer;" and the acceptor was discharged by time being given the drawer. If these cases can be sustained on principle, they have no application to this case; for it may be said with more propriety, that if one take a bill of exchange, knowing at the time that it was for accommodation, he thereby assents to receive and hold it subject to that equity of the parties; while no such suggestions can be made in this case, as these plaintiffs had no such notice, when the bills were received and discounted.

The doctrine of those two cases was, however, subsequently shaken by Justice GIBBS, in *Kerrison v. Cooke*, 3 Camp. 362, and

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was afterwards overruled in the Common Pleas, in the case of *Fentum v. Pocock*, 5 Taunt. 192, in which MANSFIELD, Ch. J., observed "that the case of *Laxton v. Peat* was the first, in which it was held, that the acceptor was not the first and last person compelled to pay the bill to the holder; and that they were compelled to differ, and hold, that it is impossible to consider the acceptor of an accommodation bill in the light of a surety for the drawer; and that if the holder had known, in the clearest manner, that at the time of giving the bill, it was for accommodation, it would make no manner of difference." With this view of the case, HEATH, J. and CHAMBER, J. agreed. It will be at once perceived, that in this case, the acceptor was held as the principal and primary debtor on an accommodation bill, known to be such by the holder, when he received it; and that act of the holder, which would have discharged a surety, was held not to affect his liability. We are not called upon, in this case, to approve or disapprove of the doctrine of that case, to the extent to which it was carried; but it is a decided authority for saying, that an endorsee for value, of a bill of exchange, who became such before its maturity, and in ignorance that it was given for accommodation, has a right to treat all parties thereon as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and that this right is unaffected by any subsequently acquired knowledge, that the bill was given for accommodation. In such cases it is regarded as a mere truism to say, that a release of the drawer, by the holder, has no effect on the ultimate liability of the acceptor.

The case of *Fentum v. Pocock*, has been sustained and approved by the subsequent cases in England; *Price v. Edmonds*, 10 B. & C. 584. *Nichols v. Norris*, 8 B. & Ad. 41. *Harrison v. C—*, ib. 36. *Rolfe v. Wyatt*, 5 C. & P. 181. 1 M. & M. 14. *Yallop v. Ebers*, 1 B. & Ad. 708. It is to be observed, also, that the same view of the subject is entertained by the different elementary authors. Chit. on Bills, 844. Smith's Merc. Law, 832. 3 Kent's Com. 104. Bayley on Bills, 864. Story on Pr. Notes, § 418, 423.

This subject has arisen before many of the courts in this country, and the rule is generally sustained, "that the parties to a bill, or note, are bound by the character which they assume upon the

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face of the bill ; if by that they are liable as *primary debtors*, or as *principal*, then, *as to the holders*, they are bound as such ; and his knowledge, at the time when he takes the bill, that they or either of them are accommodation parties, will not vary the case." *Montgomery Bank v. Walker*, 9 Serg. & R. 229. S. C. 12 Serg. & R. 382. *White v. Hopkins*, 8 Watts & Serg. 99. *Lewis v. Houchman*, 2 Bau. 416. *Commercial Bank v. Cunningham*, 24 Pick. 275. *Church v. Barlow*, 9 Pick. 551. *In re Babcock*, 2 Story's C. C. 898. *Sanford v. Lambert*, 2 Blackf. 187. *Clopper, Admr. v. Union Bank of Maryland*, 7 Har. & L. 92.

In the case of *Claremont Bank v. Wood*, 10 Vt., 582, where several, some of whom were sureties, signed a note, "*each as principals*," and promised to pay, it was held, that as to the holders, they were to be regarded as principals, and not as sureties ; and yet the primary liability of the acceptor, and the secondary liability of the drawer, is as expressly set forth on these bills, as if it were written out in full over their respective signatures. In either case, to vary their respective liabilities, as they have assumed them on the face of the bills and note, would be to vary and control their intended operation, and, in effect, to enforce a contract, which the parties never made.

On this subject it is important to observe a material distinction between joint and several promissory notes, or obligations, and bills of exchange, or notes, on which the parties have assumed only successive liabilities. In the former case, as between the makers and the holders, who at the time received the note with notice of the circumstances, under which it was given, the strict relation of principal and surety may exist, and evidence of that fact is not considered as contradicting its specific provisions, but as consistent with its terms ; and the right of contribution, arising out of that relation, exists between them. 2 Am. Lead. Cas. 289, 808, in notes. But the drawer, and acceptor, and endorsers, of a bill or note, have not assumed a joint and several liability ; neither are they strictly sureties ; but are liable to each other, in the order of their becoming parties ; and when *the action is on the bill, or instrument*, creating such successive liabilities, by an endorsee for value, without notice that the bill was given for accommodation, such testimony is inadmissible for the purpose of converting their successive liabilities into a joint and several obligation, or placing

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them in the relation of principal and surety. The testimony clearly contradicts the express provision of the bill, and materially changes its legal effect. Unquestionably those liabilities may be changed, as between the parties, by an express contract to that effect, which may be enforced between them. But this in no way affects the rights of a holder, who, at least, became such in ignorance of that arrangement. Under such circumstances, the holder has only to look to the bill itself and the genuineness of the signatures, to ascertain the nature and extent of the liability of the parties thereon; and they are liable to him in the successive order, in which their names appear upon the face of the bill. *McDonald v. Magruder*, 3 Pet. 471. *Flint v. Day*, 9 Vt. 328. *Brown v. Mott*, 7 Johns. 360.

This doctrine is sustained in Story's Treatise on Promissory Notes, in which, sec. 418, he observes, "that the strong tendency of the more recent authorities, is to hold that, in all cases, the holder has a right to treat all the parties to a bill as liable to him exactly to the same extent and in the same manner, whether he knows, or not, the note to be an accommodation note; for, as to him, all the parties agree to hold themselves primarily, or secondarily, liable, as they stand on the note; and that they are not at liberty, as to him, to treat their liability as at all affected by any accommodation between themselves." And in section 488, he farther says: "Nor would it make any difference in the case, that the released party was, in point of fact, the party ultimately bound to pay the note, and that the other party was a mere accommodation maker, payee, or endorser, for his benefit; or at least, it would not make any difference, unless the fact of its being such accommodation note were, *at the time of receiving the note*, and not *merely at the time of the release*, known to the holder." Story on Bills, § 291, 368, 432, 434. Chancellor KENT, 3 Kent's Com. 104; also observes, "that the acceptor of a bill is the principal debtor, and the drawer the surety, and nothing will discharge the acceptor, but payment or a release. Accommodation paper is now governed by the same rules as other paper. This is the latest and the best doctrine, both in England and this country."

As these bills were *received and discounted* by the plaintiffs *before their maturity*, without notice that they were for accommodation, we are satisfied, from the authorities, that they had a right to

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treat the acceptor as the principal debtor, and the drawer as liable only on his default. In such cases there is no difference between accommodation bills, and bills for value : in either case, a release of the drawer from any farther liability to the holder, will have no effect, as a discharge of the acceptor from his primary liability on the bill ; and this right, so to treat the parties on the bill, remains unaffected by any notice subsequently given, that the bill was for accommodation.

It is insisted, however, that the release of the drawer will in equity discharge the acceptor, and that the principles, which prevail in that court, are now equally available at law. From an examination of the cases in chancery, we entertain a decided conviction, that the same principles, on this subject, prevail in equity, as at law. If any diversity of opinion exists in that court, on this question, it has arisen more from a misapprehension of the rule at law, and a desire to conform to the principles there established, than from any rules prevailing in equity, at variance with them. There is much propriety in this ; for the principles regulating bills of exchange have their origin in mercantile usage, and have been adopted to meet the exigencies and wants of commercial transactions ; it is therefore equally the policy of courts of equity, as of courts of law, to make the application of, and enforce those principles, in relation to these securities, which experience has found necessary, to preserve their negotiability and credit.

In the case of the *Bank of Ireland v. Beresford*, 6 Dow, 288, Lord ELDON expressed his opinion of the case of *Fentum v. Pocock*, and observed, that, "if it went on the principle, that inquiry is not to be made into the knowledge of the party, but that all shall be taken as appearing on the face of the bill, I think it a most wholesome doctrine." The case is important only, as showing the individual opinion of Lord ELDON on that question, and as showing that no different rule had then prevailed in chancery. In the case of *Glendenning, ex parte*, 1 Buck, 517, Lord ELDON refused to adopt the principle of the decision of *Fentum v. Pocock*, and recognized the general doctrine, as held in *Laxton v. Peat*. That was the case of an accommodation acceptance, and known to be such, by the holder, when he received the bill. We are, therefore, not called upon to approve or disapprove of the doctrine of that case, for in this case, the plaintiffs had no notice, when the bills were received and discounted, that they were for accommodation.

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If the plaintiffs in this case had received the bills, with knowledge that they were given for accommodation, we do not say but that the defence would be available; for when one takes a bill, even before maturity, with notice of a given fact, it is not unreasonable, that he should be charged with the consequences that result therefrom, as if the bill had been received overdue. But that principle does not apply, when the bill is taken before maturity, without notice, and for value; for the bill is then held independent of all equities existing between the original parties; and Lord ELDON, in that case, nowhere intimates, that the principle would have such an application. It is only to the case of an accommodation bill, *and known to be such by the holder, when he received the bill*, that he made the application of that rule.

The case, however, which should and does exert a controlling influence in our decision of this case, is that of *Harrison v. Courtald*, 3 B. & Ad. 36. That case, it will be perceived, was sent from chancery, by the Master of the Rolls, for the opinion of the court of King's Bench. This circumstance, alone, creates the inference, that in relation to bills of exchange, on which the parties have assumed successive liabilities, the principles of equity are the same as at law, and that, if the acceptor of these bills is not discharged at law, he would not be in equity; for it would be an idle proceeding for chancery to send a case to a court of law, to ascertain the principles prevailing there, unless those principles have equal application in chancery. In that case, as we have assumed in this, the bill was accepted for the accommodation of the drawer, and was endorsed for value, before its maturity. In that case, as in this, the holder *was ignorant, at the time he received the bill*, that it was given for accommodation, but *was afterwards informed* of that fact, *before the act was done*, which the acceptor claimed operated as his discharge. It will at once be perceived, how very similar are the two cases, in every important particular. On the hearing of that case, the decisions at law and in equity were considered; and all the judges, CH. J. TENTERDEN, and PARK, TAUNTON and PATTERSON, Jus-
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Whether, therefore, we apply to this case the principles prevailing in equity, or at law, the result is the same. The plaintiffs having no notice, at the time they received the bills, that they were

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given for accommodation, had a right to treat the drawer as collaterally liable thereon, and the acceptor as the principal and primary debtor; and this right of the holder remains unaffected by any subsequent knowledge which he may have, that they were for the accommodation of the drawer. Under such circumstances, the release of the drawer, in no way affects the liability of the defendant, as acceptor. This view of the case renders it unnecessary to pass upon other questions, which were urged in the argument of the case.

The result is, that the judgment of the county court must be reversed, and the case remanded.

JOHN H. ROBINSON, EXR. V. ORAMEL HUTCHINSON AND WIFE.

Will. Capacity of testator. Previous and subsequent declarations of testator. Admissibility.

The declarations of the testator, made about the time of the execution of the will, tending to show importunity and undue influence, and also to show the state of the mind of testator, are admissible.

But such declarations are not admissible to prove the fact stated.

Weakness of mind arising from advanced age, disease and family affliction, exists in the mind itself, and such weakness of mind, at the time of making the will, may be inferred from weakness subsequent, therefore declarations of the testator soon after making the will, and having reference to it, and the disposition of his property, under such a state of facts, are admissible.

Testimony of this character must be limited to proof of weakness of mind, at the time of making the will, and is inadmissible as proof of the fact stated by the testator.

THIS was an appeal from a decree of the court of probate, for the district of Chittenden, admitting to probate the alleged last will and testament of Mrs. Nancy Robinson, deceased.

At the September Term of the County Court—POLAND, J., presiding—the case was tried by jury, and a verdict returned in favor of the will.

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On the trial, it was claimed by the appellants that the testatrix was a person of advanced age, and infirm health, and that at the time of the execution of the will she had become, in consequence of disease and domestic affliction, greatly broken and enfeebled in mind and capacity. That her sons, John H. and Franklin Robinson, had acquired her unbounded confidence, and exercised a great degree of influence over her, having for some years managed all her business affairs. That on the occasion of the execution of the will, the testatrix was taken by her sons on a visit to a distant relative, in the town of Weathersfield, and that on the day after her arrival there, Franklin Robinson took her into a room apart, and remained with her alone during the whole day, and there drew up the will, which was executed that evening, and carried away by said Franklin.

That the will was procured to be executed by the undue influence and control of said Franklin Robinson, who was largely benefitted by its provisions, and to the exclusion, in a great part, of his sister, Mrs. Hutchinson, the appellant; and that the testatrix was wilfully imposed upon by said Franklin as to the character and effect of the provisions of the will.

In support of these facts and tending to prove them, a large amount of evidence was produced, a part of which consisted of the depositions of Thomas Robinson, Lucy French, Attee Walker, Phebe Upham, Maria Upham, Drusilla Upham, and Lydia Burroughs.

To the admission of various portions of these depositions the appellee objected, which consisted for the most part, of the declarations of the testatrix, made at and near the time of the execution of the said will. That part of the deposition of the said Thomas Robinson, so objected to, was as follows :

"On her return from there to Mrs. Hutchinson's she came to my house, and observed to me that John H. and Franklin, were present at the making of the will, and that Franklin drew the will according to their wishes, to wit, (John H. and Franklin,) and that her head was so confused that she did not know what her will contained, and that John H. had carried it off to Burlington, and that she felt very anxious to know how it read. *Question*—Will you state what Mrs. Robinson said in your hearing with regard to her son, Franklin, obtaining certain articles

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"of clothing from her at Burlington, in August, A. D., 1847, just before they came to Chester? *Answer*—She said Franklin had over persuaded her to give up certain articles of clothing to him, that he had carried them to New York, and that she was extremely sorry and wished them back."

Lucy French testified in her deposition, that, "On the fourth of July, 1848, I spent the day with her, Mr. Hutchinson and wife being absent from home. She was as bright as she had been previously and perfectly rational and composed when I got to Mr. Hutchinson's. In the course of the forenoon, she introduced the subject of her will, (I asked her no questions,) and told me that Franklin teased her to go to Weathersfield and make a visit. She said she should not have made her will at that time, had not Franklin teased her so, and wanted it made before he went back."

"She said Franklin would not give her any peace till she had made it. She said she hoped Nancy would not feel bad to think they went there and made it, for she calculated she would fare as well as the rest of them. She said, that at the time it was made, her head was so confused, she did not know what she was about. She did not say in particular who made it, as I recollect. I tried to turn the conversation for fear she would get excited, but she was not excited at that time," &c.

The portions in the other depositions objected to, were of the same character as that above cited; and the same was rejected by the court.

It was claimed, on the part of the appellants, to be admissible, as well for the purpose of proving the facts therein stated, and her previously existing and expressed intentions as to the disposition of her property, as of showing the state and condition of the mind and capacity of the testatrix, at the time when the declarations were made, and at the times to which they referred, as tending to show the condition of her mind at the time the will was executed, and generally for the purpose of establishing the facts relied on, as before stated, to invalidate the will.

The appellants also called as a witness, Mrs. Prentiss, who testified to the mental condition of the testatrix, in the summer of 1847, (a few months before the execution of the will,) and to the then existing effect apparently produced upon her mind and health,

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by the death of testatrix's daughter, Elizabeth, in September, 1846; and also proposed to show by the witness, what the testatrix told her of the immediate effect of the death of the daughter on the mind and health of the testatrix, at the time and soon after it occurred.

To the admission of this last evidence the appellee also objected, and it was excluded by the court. The charge of the court to the jury was not objected to by the appellants; but to the ruling of the court in rejecting the evidence referred to, the appellants excepted.

E. J. Phelps for the defendants.

The evidence rejected should have been admitted.

I. It tended to show weakness of mind in the testatrix, at the time the will was executed.

This fact was material, and can never be proved except by the conversation and conduct of the party.

All the evidence referred to a period very near the execution of the will. There is no objection on principle to such evidence. It is constantly received in practice. And even the authorities that reject the statements of a testator as evidence of *the facts related*, admit them for the purpose of showing *the state of mind*. *Omstock v. Hadlyme*, 8 Con. 254. *Kinne v. Kinne et al.*, 9 Con. 102. *Mc Taggot v. Thompson*, 14 Penn. 149. *Irish v. Irish* 8 Sergt. & Rawle 573. 1 Cowen & Hill's Notes to Phillips' Ev. p. 646, 647. *Betts v. Jackson*, 6 Wendall, 178. *Reed, Exr. v. Reed*, 1 Hawks, 247. *Howell v. Barden*, 3 Dev. 642. *Nelson v. Oldfield*, 2 Vt. 76.

In almost all the cases of disputed wills in the Eng. Ec. Rep. evidence of this character was received without question.

When the present case was formerly before the Supreme Court, this testimony was conceded to be admissible for the purpose for which it was claimed. The only question was as to its competency to prove *the facts stated by the testatrix*. And the point decided was, that declarations of the testatrix *amounting to a revocation*, were not admissible.

II. The testimony of Mrs. Prentiss, and those passages in the depositions, that refer to the statements made by the testatrix, as to her bodily health and the condition of her mind, are further admissible as proving the fact therein stated.

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Affection of the mind generally results from bodily infirmity. And such infirmity cannot usually be shown except by the statements of the party.

These statements are not analogous to declarations made by a person in his own favor. It is absurd to say that a testator has an interest to defeat his own will; and more absurd to suppose that he would seek to accomplish that object by making representations in regard to his health, that would furnish circumstantial evidence of insanity. The statements of a party as to his bodily symptoms, at the time of their existence, are admissible as evidence even in his own favor.

III. Those passages in the depositions which relate to the expressed intentions of the testatrix, both before and after the execution of the will, in regard to the disposition of her property, are further admissible to show that the will, as drawn, is inconsistent with those intentions.

In all cases where capacity or free agency in making a will is in question, the fact that the will does not compare with expressed intentions is not only admissible, but is regarded as of the highest importance. 1 Eng. Ec. Rep. 67, 88, 116. 4 Eng. Ec. Rep. 650, 118. 3 Eng. Ec. Rep. 95.

IV. Those passages in the depositions, which contain statements of the testatrix in regard to the manner in which Franklin Robinson had previously obtained certain property from her, and the effect of those transactions upon her testamentary intentions toward her daughter, (the defendant,) are also admissible upon two grounds in addition to those urged.

First, as showing the facts so stated.

Second, as showing the undue influence which Franklin had acquired over her feeble mind previous to the execution of the will. *Ramble v. Tryon*, 7 Sergt. & Rawle, 90.

V. The passage in Mrs. Burrough's deposition, in which she states that she mentioned the facts to which she testifies to another person, viz: "I recollect of saying to our people, after Mrs. Robinson left, that Aunt had failed since I last saw her, as to her faculties, and did not appear to be as well," being at the time they occurred, is admissible not as evidence of the facts, but as showing the attention of the witness to have been drawn to the subject at the time, and the manner in which it was fixed in her recollection. This is every day's practice.

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L. E. Chittenden and G. F. Edmunds for plaintiff.

I. The testimony objected to, and excluded by the court below, had no legal tendency to prove that the testatrix, *at the time she made the statement testified to*, was either of unsound mind, or weak and enfeebled intellect, but the contrary. These statements are all in reference to antecedent facts, which the appellants claimed to exist.

The rule as to declarations of the testatrix, made after the execution of the will, as established by this court, in this case, and supported by the best considered cases, is this : When the declarations have a tendency from their intrinsic nature, to show that the mind of the testatrix, at the time she made the will, was unsound, imbecile, or in such a condition as to be subject to the exercise of undue influence, they are admissible for that purpose only. They are never evidence of their own truth. *Jackson v. Kniffen*, 2 J. R. 31. *Comstock v. Hadlyme*, 8 Con. 254. *Stevens v. Van Cleve*, 4 Wash. C. C. R. 262. Cowen and Hill's notes to Phil. Ev. Part 1 p. 648. *Provis v. Read*, 15 E. C. L. 430. *Moritz v. Brough*, 16 S. & R. 403.

The only ground upon which they are admissible to this limited extent, is, that in some cases, evidence establishing imbecility, &c., at the time of the declarations, may have some tendency to show that the state of the testator's mind was similar at the time of the execution of the will.

The inference from the declarations, is to be drawn through the state of mind at the time they were made, and not directly from the declarations themselves, as such.

The jury may in some cases, infer imbecility, &c., at the time of the execution of the will, from imbecility subsequent; and infer imbecility, &c., subsequent, from declarations containing intrinsic evidence of it. But it is only in cases where the imbecility is shown to be of a continuously permanent nature, existing in the substance of the mind itself, that the subsequent mental condition ever has any tendency to prove that such condition existed at any time prior. Such is not this case. Here the difficulty is not in the mind itself, but in the degree of influence exercised over it; and the weakness is only material as affecting the degree of influence necessary to the result. In such instance there is no safe rule upon which declarations of the character of those in question, can be received.

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II. Were the declarations of the testatrix, made *after* the execution of the will, and not accompanying any *act*, evidence, to prove *directly* the state of imbecility, &c., at the time of the execution of the will; which was the point in issue.

We insist that they were not evidence of such fact.

They contradict her written declaration, (the will,) upon the same point, and are mere hearsay. See cases cited *ante*.

You cannot say that the testatrix was imbecile, &c., at the time of the execution of the will, because she afterwards so declared, any more than you can say that the witnesses did not sign in her presence, or that a wrong intent was expressed, because she now asserts that such was the fact.

Her declarations of this character cannot be distinguished from those of any other person equally cognizant of the fact, for they are not declarations of a party against her interest, *and thus facts in themselves*.

They are no more evidence as to the *factum*, than as to the construction; *Doe v. Palmer*, 6 E. C. L. & E. R. 155. *Wetherhead v. Baskerville*, 11 How. 330.

Such evidence directly contravenes the statute of wills. It contains and encourages the misrepresentations, uncertainties, and perjuries, which it is the purpose and spirit of the statute to avoid; and it operates as a parol revocation of a will, executed with all the formalities required by law. *Smith v. Fenner*, 1 Gall. 170. *Dan v. Brown*, 4 Cow. 383. *Brown v. Betts*, 6 Cow. 377, and cases cited *ante*.

III. The declarations objected to, were offered by the appellants, as the exceptions show, for the purpose of showing the following facts collectively, viz: the exercise, *in fact*, of duress, or undue influence, and the imbecility, &c., of the testatrix's mind.

In any point of view they were not competent for *the purpose*, or to the *extent* proposed, as tending to show all these facts. The decision of the court was, that the evidence was not admissible for the purposes for which it was offered. This was correct. When evidence is offered to show a multiplicity of facts, the court is not bound to sever and divide the proposition in order to determine whether there is not some one fact embraced in it, which the evidence has a legal tendency to establish.

The opinion of the court was delivered by

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ISHAM, J. The probate of this will is resisted on the ground, that it was obtained from the testatrix, by the influence and undue importunity of her sons, John H. and Franklin Robinson. The will was drawn by Franklin Robinson, who was largely benefitted by its provisions, to the exclusion in a great degree of his sister, Mrs. Hutchinson. It is insisted, that the testatrix was imposed upon by him, at the time of its execution, as to the character and effect of its provisions; and that the will was obtained, when the testatrix was greatly enfeebled in mind, not only by infirmities usually attendant upon persons of her advanced age, but by various bodily diseases, and a domestic affliction in the death of her daughter. It is also insisted, that she was unable to overcome those influences then exerted upon her mind; and that her will was obtained, thereby making a disposition of her property different from what she then desired, and contrary to her former expressed determination. In other words, it is said, that the instrument expresses the will and desire of Franklin Robinson, rather than that of the testatrix.

In cases of this character, the presumption is in favor of the will, and of the capacity of the person making it. It is therefore incumbent on the party attempting to defeat the will, to show affirmatively, the existence of any disability. 1 Swinb. on Wills, 119. Shelford on Lunacy and Persons of Unsound Mind, 274. For that purpose, and in proof of the issue in the case, the declarations of the testatrix made shortly previous, and subsequent to the time of the execution of the will, were offered in evidence by the appellants, and were rejected by the court. It is insisted that her declarations were admissible for the purpose of proving the *fact stated, that such undue influence and importunity was exercised*; and also to prove the weak and enfeebled state of her mind, at the time of the execution of the will.

In relation to the admissibility of her declarations to prove the fact that such importunity and influence were exerted, we must consider that matter as settled by a former decision of this court, in this case, in which her declarations were held inadmissible for that purpose. That decision is evidently sustained by the authorities. *Provis v. Reed*, 5 Bing. 435. *Smith v. Fenner*, 1 Gall. R. 170. *Jackson v. Kniffen*, 2 Johns. 81. *Comstock v. Hadlyme*, 8 Con. 263.

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The authorities, however, fully sustain the position, that those declarations are admissible in evidence, for the purpose of showing the state and condition of her mind at the time of the execution of the will; that it was in that weak and enfeebled state, in which she was incapable of resisting the importunity and influence, which it is claimed, was exerted upon her. That evidence should not have been entirely rejected from the consideration of the jury. On this subject, it is proper to observe, that the object of the testimony was not to show imbecility, or the want of a disposing mind; but to show a weakness of mind, which rendered its free agency easily overcome by influences from that source; and to lay the foundation for the introduction of other and more direct testimony, showing that such importunity and influence was in fact exerted on that occasion, which may be sufficient to avoid it.

In the case of *Nelson v. Oldfield*, 2 Vt. 76, the declarations of the testatrix were admitted in evidence, when made after the will was executed, in which she complained of having been circumvented in making the will, and of the injury she had done her mother and sisters. On that testimony, the court of chancery refused its aid relative to a trust estate, though she had expressly refused to revoke the will. The court in that case gave effect to the testimony, and thereby defeated the operation of the will itself. It is a much stronger case than this. In *Comstock v. Hadlyme*, 8 Con. 263, declarations of the testatrix, made about the time of executing the will, tending to show importunity and undue influence, were admitted to show her state of mind, though not to prove the fact stated. That testimony was received at the circuit, and a new trial was refused. The same doctrine was afterwards sustained in the case of *Kinne v. Kinne*, 9 Con. 105. This doctrine is sustained in Pennsylvania. In *McTaggart v. Thompson*, 14 Penn. 159, the declarations of the testator, "that he had ruined his family, had been deceived and imposed upon by persons who had procured him to have his will made," were admitted in evidence to show his weakness of mind at the time of making his will. The same rule was adopted in the cases of *Rambler v. Tryon*, 7 S. & Rawle 94. *Chess v. Chess*, 1 Penn. 32, in which the court observed, "that the declarations of a testator although after the execution of the will, are evidence of weakness of mind." *Irish v. Irish*, 8 S. & R. 373. In the case of *Reed Exr. v. Reed*,

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1 Hawks. (N. Car. R.) 247, 268-9, this subject was examined with great research, and such declarations were held admissible to defeat the will itself. Without adopting the doctrine of the case to that extent, it is a strong case, sustaining the admissibility of the testimony, for the purpose for which it was offered in this case. In that case the court observed, "that to reject the declarations of the only person having a vested interest, and who was interested, to declare the truth, involves almost an absurdity. It was not necessary that the declarations be a part of the *res gestae*, for whether they accompany an act or not, whether made long before, or long after making the will, is entirely immaterial, as to their competency. Those circumstances only go to their weight, or credit with the tribunal, which is to try the fact." The same doctrine was afterwards sustained in the case of *Howell v. Barden*, 8 Dev. 442, 444 to 451. The true rule and distinction on this subject, we apprehend, is given in 2 Phil. Evid. in Notes by Cowen & Hill, 648, in which the editor remarks, "that the difficulty seems to lie in acting upon the distinction between declarations going to develop the operations of the mind, and those containing the assertion merely of a distinct fact. The former are admissible, the latter not."

We do not perceive any serious objection to the admission of this testimony in this case, under that limitation, when the declarations were made so near the time of the execution of the will, that a reasonable conclusion, may be drawn as to the state of mind of the testatrix at the time the will was executed. Weakness of mind, arising from advanced age, in connection with causes suggested in this case, is progressive and permanent in its character. It exists in the mind itself, and therefore it is, that weakness of mind, at the time of making the will, may be inferred from weakness subsequent, as much so, as imbecility of mind under similar circumstances; and particularly is the testimony important, in showing the extent and character of the influence, which the person drawing the will, had over the mind of the testatrix.

Upon these principles, and under that limitation, a portion of the testimony of Thomas Robinson, Lucy French, Mrs. Prentiss and Attee Walker, stating the declarations of the testatrix, soon after making the will, and having reference to it and the disposition of her property, should have been received. It is for the ju-

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ry to say, what weight is to be given them, and how far they tend to show the condition and state of mind of the testatrix, when she executed the will. It has been properly observed, that the evidence is dangerous in its character, and is to be received with great caution. It must be strictly confined to proof of weakness of mind, at the time of making the will, and not to proof of the fact stated, that such influence and importunity was exercised on that occasion.

The judgment of the County Court is reversed, and the case remanded.

A. E. DURAND v. WILLIAM F. GRISWOLD.

Abatement. Averments. Demurrer.

In a plea of abatement where new matter is introduced by the plea, containing matters of fact, as well as of record, the plea should not conclude with the verification that he is ready to verify with the writ or record, but with the common verification.

If, however, the entire issue is to be proved by the record, the plea should conclude with the verification that "he is ready to verify by the writ or record."

In a plea in abatement, the averments should be direct and positive, so that a traverse will present a proper issue; and where the material and issuable part of the plea was, whether the defendant resided at Charlotte, when the suit was commenced, and the averment was, "that at the time of issuing and service of said writ, the said defendant did reside and for a long time before, had and ever since has resided, in the town of Burlington and not elsewhere," the averment was held defective on demurrer.

But the averment, as to the residence of the plaintiff, "that at the time aforesaid, he did not reside in Charlotte," was held to be well made, and properly to present the issue as to the residence of the plaintiff.

BOOK ACCOUNT. The action was originally commenced before a justice of the peace, and came to the County Court by appeal.

The defendant filed a plea in abatement, setting forth, "that the said writ at the time of the *issuing and service thereof*, was returnable before Ezra Holt, a justice of the peace in and for the

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"county of Chittenden, at his, the said Holt's office, in the town
 "of Charlotte, in said county, and that at the time of the *issuing*
 "*and service of said writ*, the said defendant did reside and a long
 "time before had, and ever since has resided, in the town of Bur-
 "lington, in said county of Chittenden, and State of Vermont, and
 "not elsewhere, and that at the time of *issuing and service of said*
 "*writ*, the said plaintiff did not reside in said town of Charlotte,
 "and that this suit was not, and is not commenced or prosecuted
 "in whole or in part to recover any debt or demand for goods,
 "wares or merchandize, sold or delivered in said town of Char-
 "lotte, and this he, the said defendant, is ready to verify, where-
 "fore," &c.

To this plea the plaintiff demurred.

The County Court, September Term, 1858—PICK, J., presid-
 ing—adjudged the plea in abatement sufficient, and rendered judg-
 ment that the writ abate.

Exceptions by plaintiff.

Geo. F. Edmunds for plaintiff.

The plea in abatement makes no reference to the writ, or pre-
 vious proceedings, and must therefore stand or fall alone. *Pear-*
son v. French, 9 Vt. 349. *Bowman v. Stowell*, 21 Vt. 309.

2. It does not appear to have been put in, in time. A plea in
 abatement out of time is demurrable. *Jennison v. Hapgood*, 2
 Aik. 81.

3. The material allegations in the plea, as to the issuing of the
 writ, and where it was returnable, &c., are alleged with no *venue*
 or time. Stephens' Pl. 811.

4. Where the writ was made returnable, the nature of the ac-
 tion, can only be tried by the court, by inspection of the writ and
 declaration. The plea ought, therefore, to have offered that mode
 of proof, by making profert of the writ, or, at least, by reference
 to it. The common verification *in pais*, at the end of the plea, is
 not sufficient. Stephens' Pl. 69, 437-8.

5. The traverse of the plaintiff's residence in Charlotte is too
 broad. It traverses such residence in the *conjunctive* "*at the time*
of the suing and service of said writ." This implies that the
 plaintiff might have resided there at *either* of said times, which
 would be sufficient. Stephens' Pl. 261. Chit. Pl. 614.

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6. It is only alleged argumentatively that the defendant did not reside in Charlotte. The allegation is that the defendant "resided in Burlington, and not elsewhere." This in strictness is only an infallible argument, that he did not reside in Charlotte. A formal traverse of this character, should always be laid directly to the very point in question.

Underwood & Hard for defendant.

It is objected that the material allegations are laid without *time* or *venue*. This is unfounded in fact, all the traversable allegations are laid with time and place. The *venue* is *Charlotte* and the *time* of the issuing of the writ.

The plea is not a *traverse* of any facts. It is an independent allegation of matter *de hors* the record, which the defendant would be compelled to prove if the plaintiff traversed the plea; and it is not objectionable as being too broad.

When the plea does not make the writ and officers return a part of the plea, the plaintiff cannot refer to them to aid a demurrer.

The commencement of the suit is the service of the writ and not the time the writ bears date, except to take a case out of the statute of limitations.

If the plea presents more than the defendant would be required to prove, it could not be an objection, which the plaintiff could raise as it would be against the pleader; and in this case it is no more objectionable for being in the *conjunctive* than if it had been in the *disjunctive*.

If the plaintiff did not reside in Charlotte at the time he procured his writ served, he could not bring his suit there.

And because the defendant says he did not live there at that time, or before, it would be no good objection to the plea.

The opinion of the court was delivered by

ISHAM, J. The plea in this case is founded on the provisions of the Comp. Stat. 234, § 83, 86, which provides that all suits before a justice of the peace must be made returnable within the town where the plaintiff or defendant resides, if either resides in the state; except in actions for goods, wares and merchandize sold and delivered, when the action must be brought in the town where they were sold. The questions arise on a demurrer to the plea in

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abatement; and it is insisted that the plea is insufficient, as it does not appear from the same, or by reference to the writ, that that matter was pleaded in abatement before the justice. If it was material that the objection should have been taken there, it was not necessary to make such an averment in the plea; nor to refer to and make the writ and proceedings thereon, a part of the plea. The question would more properly arise on a motion to dismiss the plea, or the facts should have been introduced on the record, by way of replication. The plea also properly concludes with the common verification, and should not have concluded, that he was ready to verify by the writ, or record. This would have been necessary if the entire issue was to be proved only by the record. But when new matter is introduced by the plea, containing matters of fact, as well as of record, the common verification is proper. The commencement and prosecution of the suit, and the actual residence of the parties, are matters of fact; they are constituent parts of the same defence, and form one connected proposition, and, therefore, should conclude with this verification.

A greater degree of certainty and strictness is required in a plea in abatement, than in a plea in bar. Like a plea in bar, it should be certain as to time and place, and the averments are to be direct and positive, and not argumentative, so that a traverse will present a proper issue, and be capable of trial. The averment "that at the time of issuing and service of said writ, the said defendant did reside, and for a long time before, had and ever since has resided, in the town of Burlington, and not elsewhere," we think is defective on this demurrer. The material and issuable fact was, whether the defendant resided at Charlotte when the suit was commenced. The averment may satisfactorily show, that the defendant did not reside at Charlotte, at that time, as he could not, if he resided at Burlington and not elsewhere; but that conclusion is a matter of inference, and technically the plea is argumentative. The averment should have been direct and positive, that the defendant did not at that time reside at Charlotte. As the averment now is, no traverse can be well taken; for if a traverse is taken in the words of the plea, the issue will be whether the defendant resided at Burlington and not elsewhere, instead of being whether he resided at Charlotte. The averment in this respect is well made, as to the residence of the plaintiff, "that at the

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time aforesaid he did not reside in Charlotte." A traverse of this averment would present the issue as to the plaintiff in proper form; and in this manner the averment should have been made in relation to the defendant.

It is unnecessary to pass upon other objections, which have been urged, as the plea in this respect is defective.

Judgment reversed and defendant must answer over.

HURLBUT & HODGES v. JONAS G. CHITTENDEN.*Book Account. Contract. Consideration.*

Where a contract was made between the plaintiffs and the defendant and B, a third person, that the defendant should employ B. to build a saw mill, and that defendant should pay to the plaintiffs the amount of B's earnings, to be applied on a debt which B. had previously contracted with the plaintiffs; there was also a contract between the defendant and B. that if the mill did not do a good business, defendant need not pay anything; it turned out that the mill was good for nothing, and that the labor of B. was a damage to the defendant; under this state of facts, it was held, that the plaintiffs could not enforce payment of B's wages, (though they were ignorant of the last named contract between the defendant and B,) as the defendant received no value for his promise to the plaintiffs, and the plaintiffs parted with nothing, their debt having been previously contracted with B.

BOOK ACCOUNT. Judgment to account was rendered in the County Court, and an auditor was appointed, who returned his report to the County Court.

The only question raised upon the report of the auditor, was in relation to item number 15 in the plaintiffs' account, which was in these words, "Amount paid Bronson, per contract, \$70 53."

In relation to this item, the auditor found and reported the following facts: That at the date of said charge, and for some time prior to doing any of the work hereinafter mentioned, one Bronson, a mill wright by trade, was indebted to the plaintiffs, who were merchants, on general book account, in a sum greater than the amount of said item. That some weeks prior to said charge, the defendant being about to erect a saw mill, the subject of em-

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playing Bronson to build or superintend the building of said mill, and have the defendant pay to the plaintiffs, the amount of his work to be applied on Bronson's account, became a matter of conversation between all of said parties, as was also the question, as to the manner in which the price of such labor should be secured to the plaintiffs and secured from the trustee process, said Bronson being at the time indebted to other persons, and of little pecuniary responsibility, though plaintiffs deemed the account against him good and ultimately collectable. Thereupon it was agreed between said Bronson and the defendant, that Bronson should superintend and aid in the erection of said mill, for which he was to be paid at the rate of \$1 50 per day, for his services, said Bronson promising said defendant, to make a mill at the proposed point, that would perform 200 revolutions per minute, and do a good business on that stream, and if it did not, he, defendant, need not pay him any thing, at the same time explaining to the defendant the manner of the construction.

Bronson built the mill in the manner proposed, and during the progress of the work, the defendant doubted the propriety of his plan, and remonstrated against it; but Bronson claimed to know how to build it and proceeded with his work as stated. By means of some error in the arrangement, the works were swept away and destroyed the first time they attempted to use it, and within a few days after, the charge No. 15 was made. The auditor found that the said Bronson's work was in fact of no value, but an injury to the defendant.

That it was agreed between the parties, that Bronson at the end of each week, should draw an order on the defendant in favor of the plaintiffs for the amount of his work during the week, at \$1 50 per day. All these terms and conditions were mutually understood and agreed upon between the parties, except that the plaintiffs had no knowledge or notice of any terms in the contract, as between the defendant and Bronson, whereby Bronson's pay was to depend upon any condition, except that of his actual daily labor.

That orders were drawn from week to week with the knowledge and assent of defendant, who personally delivered some of them to the plaintiffs, who laid them aside from time to time intending to charge them all up when they got through. The auditor also found that throughout the whole transaction, the defendant sup-

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posed and understood that he was only bound to pay the plaintiffs to the extent, that he should be finally liable to Bronson under his contract, and that the drawing of the orders and charge on the book and all that he said about earnings, was all subject to his contract with Bronson, and that the plaintiffs on the other hand not being aware of the conditions of such contract, supposed and understood that they were to be entitled absolutely to the \$1 50 per day, of such actual labor.

It also appeared, that the defendant had been trustee and disclosed in that suit, that he had agreed to pay to the plaintiffs, and that nothing was due Bronson, &c.

The County Court, March Term, 1853—PECK, J., presiding—decided that the plaintiffs were entitled to recover for the amount of said item.

Exceptions by defendant.

Phelps & Chittenden for defendant.

I. The debt due from Bronson to the plaintiffs had all accrued before the contract between plaintiffs, defendant and Bronson was made. By the terms of that contract, defendant was to pay plaintiffs "*all that Bronson earned.*" The report shows that Bronson *earned* nothing. They could have no greater benefit from the contract than Bronson himself.

1. This contract was void by the statute of frauds. It was for the payment of the debt of Bronson already accrued, and was not in writing. *Sampson v. Patten*, 4 Johns. 422. *Jackson v. Rayner*, 12 Johns. 291. *Barker v. Bucklin*, 2 Denio, 45, 60. *Roberts on frauds*, 228, 242.

2. It was not binding upon the defendant beyond the amount of Bronson's actual earnings. Beyond that point it was void for want of consideration. *Arden v. Rowley*, 5 Esp. 254.

II. The charging over of the orders with the assent of the defendant before it was ascertained whether Bronson had earned any thing, did not vary the rights of the parties.

1. It did not take the case out of the statute, because there was no writing executed, and the debt against Bronson was not discharged. 2. Nor can the defendant be made liable upon the ground that plaintiffs have lost any rights against Bronson. They have not discharged the debt against Bronson. The case shows

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that they considered him responsible, and it expressly finds that defendant did not intend to assume Bronson's debt.

Maynard & Mead for plaintiffs.

I. From the facts reported by the auditor, it appears that the undertaking of the defendant to pay the plaintiffs the amount of Bronson's labor, amounted to an independent contract. *Saunders v. Davis*, 9 Vt. 186. *Arbuckle v. Hawks*, 20 Vt. 538.

II. The orders were drawn with the knowledge and consent of the defendant, and some of them by him delivered to the plaintiffs, and at the request of the defendant charged to him by the plaintiffs, the defendant saying that was the agreement.

These facts amount to an acceptance of the orders.

The plaintiffs' rights are not to be affected by any conditions in the contract between the defendant and Bronson, which were not communicated to the plaintiffs, and made a part of the defendant's understanding with them.

The opinion of the court was delivered by

BENNETT, J. No question is made in relation to the auditors report, except as to item 15 in the plaintiffs' account.

By that charge, the plaintiffs seek to recover a portion of their debt, which was originally against Bronson.

It was agreed between the three parties, that Bronson should superintend the building of a saw mill for the defendant, and that he should pay to the plaintiffs the amount of Bronson's earnings, to be applied on the plaintiffs' account against him; and his wages were estimated to be at the rate of \$1 50 per day, which the defendant was to pay the plaintiffs.

There was a provision in the contract between defendant and Bronson, that if the mill did not do a good business, the defendant need not pay anything.

The auditor reports, that the mill was good for nothing, and Bronson's labor a damage to the defendant. But this provision in the contract was not communicated to the plaintiffs, and they supposed the \$1 50 per day was absolutely payable.

It is perfectly clear, that upon the facts reported, Bronson had no claim against the defendant, which he could enforce; and the question is, can the plaintiffs enforce payment where nothing was due to Bronson?

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It is quite clear, that when the agreement was made, by which the defendant was to make payment of Bronson's wages to the plaintiffs, it was upon a valid consideration, which was to pass from Bronson to the defendant, and in the end it turned out this consideration failed.

We can not see upon what ground the plaintiffs can recover this item. The defendant, as it turned out, received no value for his promise to the plaintiffs; and the plaintiffs have parted with nothing. Their debt against Bronson had been previously contracted, and the auditor does not find that the plaintiffs at any time agreed to forego any right against Bronson. If such had been the fact, the case would have merited a different consideration.

The orders were drawn by Bronson upon the defendant, in favor of the plaintiffs, from week to week, to avoid the trustee process; and the defendant agreed to accept them, upon the ground that he was only to be bound to the amount of his indebtedness to Bronson, and when the orders were looked up and charged over, it was with the same understanding on the part of the defendant.

The fact, that the plaintiffs supposed Bronson was at all events, to have \$1 50 per day, can make no difference, as it does not appear that they, relying upon this, parted with any right as against Bronson.

The failure of consideration doubtless was unexpected to both plaintiffs and defendant; but we see no good reason why the defendant can not avail himself of it.

The judgment of the County Court is reversed; and judgment for defendant for the sum reported due him after deducting the 15th item from the plaintiffs' account.

Taylor v. Rhodes et al.

SAVEDRA W. TAYLOR v. WILLIAM RHODES, JOHN KENNEDY,
AND SAUL BISHOP.

Trover on an officer's receipt for property attached.

In an action of trover on officer's receipt for property attached, it was held, that the expression, "we being receiptors," in a written admission of a demand and refusal to deliver the goods in controversy, was evidence only of the fact, that a receipt had been given.

And it was also held, that the plaintiff's right of action must depend upon the tenor of the receipt.

TROVER on an officer's receipt for property attached on a writ. Plea, the general issue, and trial by jury.

On trial, the plaintiff among other things, claimed that he attached the property in question, as sheriff, on a writ in favor of Abbey & Freeman, against said Rhodes and Kennedy, two of the defendants; and that said property was receipted by the said defendants, and by Bishop, the other defendant, in the usual way in such cases; all which was denied by the defendants.

The plaintiff offered in evidence the original writ, the officer's return thereon of attachment, with proof of a judgment in favor of said Abbey & Freeman in that suit, and that execution was duly and seasonably issued and delivered to the plaintiff, as such sheriff, to charge the property attached.

The plaintiff also offered in evidence the following written acknowledgement by defendants of a demand of the property, viz: "We the undersigned hereby acknowledge a demand upon us this day by S. W. Taylor, Sheriff, who holds this execution for collection, for the list of property certified by D. B. Buckley, Clerk, as the same property attached on the original writ; (and we being the receiptors thereof to the said Taylor,) and we refuse to deliver the same to him."

(Signed)

W. RHODES, JR.
JOHN KENNEDY,
S. BISHOP.

Richmond, March 9, 1851.

The signatures to the same were admitted.

The court found upon the affidavit of the plaintiff the loss of the receipt; and under objection by the defendants, admitted said

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written acknowledgement to be read in evidence to the jury, not only as evidence of the demand of the property and refusal of defendants to deliver it, but *also as evidence tending to show the contents of the receipt and its execution and delivery* by the defendants.

The defendants then offered evidence tending to prove, that at the time the plaintiff demanded the property, and defendants signed said admission, the receipt was not present, and that the plaintiff represented to defendants that he had there ceipt at home in Burlington. That defendants signed said admission solely upon plaintiff's representation that he had such receipt, and without any other knowledge or recollection that they had executed such receipt or any receipt for the property in question, and so informed the plaintiff at the time of signing said acknowledgement.

This suit was commenced and entered in court, March Term 1852.

The court, September Term, 1853—PECK, J. presiding—charged the jury, among other things not excepted to by defendants, that said written acknowledgement tended to show the execution and delivery, by the defendants to the plaintiff, of a receipt for the property in question in the usual form of receipts for property attached. The jury returned a verdict for the plaintiff.

To that portion of the charge above detailed the defendants excepted, and also to the foregoing decisions of the court.

Maynard & Mead for defendants.

When the loss of the instrument is properly proved, the secondary evidence of the contents should be direct and positive, and not circumstantial and vague, leaving it for the jury to guess at its contents.

The written admission does not tend to show the contents of the receipt, but simply, and at most to show the *existence* of a receipt. The court left it to the jury to infer from this what the tenor and effect, as well as the contents were.

The effect is a question of law, the contents a question of fact.

If the evidence is not disputed, the effect is a matter of law, which the court submitted to the jury. Now this admission either *ex vi termini* proves the contents, or proves nothing to be submitted to the jury.

The court instructed the jury, that from this they might find not only the contents of the receipt, but its execution and delivery as

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well as a demand and refusal, and that the receipt was in common form.

No evidence of what the common form of a receipt is, was introduced.

What is the common form of a receipt?

Some are to return the property on demand, some to return it to the officer holding the execution, and others in the alternative to return the property or pay the judgment.

Geo. F. Edmunds for plaintiff.

1. The plaintiff was entitled to recover upon the evidence aside from his own testimony. The admission of the defendants that they were "receiptors," must be referred to any legal mode by which that relation could exist. It will not be contended that a written receipt was necessary to that relation. If they received the property from the plaintiff by parole bailment, they were receiptors.

2. The admission of the defendants that they were receiptors, was not secondary evidence, even if it supposed the evidence of a written receipt. Phil. Ev. 226-7-8-9. 2 Cowen & Hill's notes 540, 556. *Earl v. Picken*, 5 C. & P. 542. *Newhall v. Holt*, 6 M. & W. 662. 1 H. & W. 18.

3. The defendants' admission being in writing was of as high a grade of evidence as the receipt itself. There is no reason or authority for saying that one of two *original* writings, concerning the same subject is inferior in kind to the other.

The opinion of the court was delivered by

BENNETT, J. The written admission of the defendants was received under objection; and the court charged the jury, that it tended to prove that the defendants gave a receipt for the property attached in *the usual form*. We think that the expression in it, "we being receiptors," can only be evidence of the fact recited, that is, that a receipt was given.

The case shows, the only evidence to prove the giving of a receipt, was the written admission *of its contents*. There was no evidence of a usage among officers to take receipts for property attached in any particular form, if such evidence would have been admissible, and no attempt to show what was the usual form, and most clearly the court and jury cannot take judicial notice of what

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might be the usual form of officers' receipts, if there was any such.

The plaintiff's right of action must depend upon the tenor of the receipt, and of course it is important to the rights of the parties. We think the judgment of the county court, for the reasons assigned, must be reversed. We have no occasion to pass on any other question.

Judgment reversed.

HARMAN SHERMAN v. CHARLES HOBART & TRUSTEE.

Bankruptcy—New promise—Condition precedent.

Where the plaintiff relied upon a new promise to avoid a plea of bankruptcy, and the evidence showed a promise to pay when the defendant was of sufficient ability, it was held, that his being of sufficient ability to pay is a condition precedent; and that the promise can be of no avail until the condition is complied with.

ASSUMPSIT. In this case the plaintiff relied upon a new promise to avoid the defendant's plea in bankruptcy. The case was referred under a rule of court, and the referee found and reported the following facts:

That the defendant was duly discharged under the bankrupt law of the United States, in May, 1848; and that the defendant after said discharge made a conditional promise to the plaintiff, to pay the demand in suit, when he, the defendant, should become of sufficient ability to do so. That the defendant was poor at the time of making said promise, and that he was not of sufficient ability to pay after making said promise, at any time before the commencement of this suit.

The county court accepted the report, and rendered judgment for the defendant on the same.

Exceptions by plaintiff.

S. S. Brown for plaintiff.

Smalley & White for defendant.

 Spear v. Stacy.

The opinion of the court was delivered by

BENNETT, J. The plaintiff in this case relied upon a new promise to avoid a plea of bankruptcy; and the evidence showed a promise to pay when the defendant was of sufficient ability. The referee finds that the defendant was poor at the time he made the promise, and was not of sufficient ability, from that time up to the commencement of the suit. The promise being conditional, it most clearly can be of no avail until the condition is complied with. His being of sufficient ability to pay is a condition precedent.

We see no objection to any of the decisions of the referee in regard to the admission of evidence, or as to its effect.

The judgment of the county court is affirmed.

 GEORGE N. SPEAR v. HENRY B. STACY.

*Debt on bond. Assessment of damages for breach of condition.
Referee.*

When a case has been referred under a general rule of reference, no questions of law are before this court, except such as are saved by the referee.

Where the defendant gave the plaintiff a penal bond, conditioned that he would build a certain house for J. by the first day of August, A. D., 1849, and save the plaintiff harmless from all liability on plaintiff's contract to build the said house, and the defendant failed to build the house by the time specified, and the plaintiff commenced a suit upon said bond, and after the commencement of said suit, the plaintiff was compelled to finish said house at the expense of about seventy dollars, it was held, that this expense should be included in the assessment of the damages, it being found by the referee, to whom the case was referred, that there had been a breach of said bond when the suit was brought.

And if the bond be treated, as a bond of indemnity, it was sufficient to sustain the action, that there had been a breach of its condition, when the action was brought.

Damages on bonds of indemnity, are always assessed up to the time of trial.

DEBT on bond. Plea *non est factum*, and special pleas.

The facts in the case, are as follows: The plaintiff purchased of one Josepha, water lots, Nos. 55, 56 and a part of lot No. 57, in

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Burlington, and agreed to pay for them by building a certain house on lot No. 33. Stacy, the defendant, purchased the house lots of the plaintiff, and gave the plaintiff his bond to fulfill plaintiff's contract to Josephs, and to save the plaintiff harmless from all liability on said contract, &c.

The case was referred under a rule of court to a referee, who reported substantially the following facts :

That the defendant did not perform the condition of his said bond, particularly as to furnishing window blinds for said building ; and that the plaintiff, after the time for the completion of said contract, (which was on the first day of August, A. D. 1849,) and after the commencement of this suit, (which was on the 26th day of August, A. D., 1850,) to wit, on the 24th day of November, A. D., 1850, furnished window blinds, at an expense of thirty-eight dollars, and in February, 1851, paid twenty-two dollars and sixty-eight cents for hanging the same ; for which sums the referee found the defendant indebted to the plaintiff, with interest ; subject to the opinion of the court, whether the plaintiff can legally recover the same, as payment of the same was incurred and made after the commencement of this suit.

The county court, September Term 1852,—POLAND, J. presiding,—rendered judgment on the report for the plaintiff.

Exceptions by defendant.

D. A. Smalley for defendant.

1. The defendant contends, that the bond is a mere bond of indemnity, to save the plaintiff harmless from said contract, and the parties have so treated it in their pleadings. *Douglas v. Clark*, 14 Johns. 177. 6 Hill, 324.

2. If so, then plaintiff has brought his suit prematurely, because he must not only have been liable to pay, but must *have paid* before he can maintain his action.

The law has wisely made a distinction in the case of a bond of indemnity from one individual to another, and a like bond to a public officer. In the first case the plaintiff must pay the money, before he can sustain his action. *Donely v. Rockfellen*, 4 Cowen, 258.

In the other case, the public officer can sustain his action on the bond, after there is a judgment against him, and before payment. See *Donely v. Rockfellen*, *ante*.

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But in both cases the amount must be fixed, and rendered certain, or the damages must be nominal. *Chace v. Hinman*, 8 Wend. 456. *Donely v. Rockfellen*, 8 Cowen, 639.

L. B. Englesby for plaintiff.

The liability of Stacy, the defendant, on the bond, is direct, and not contingent. The words of the bond are, if said Stacy shall fulfill said Spear's contract with said Josephs, *and build said house for him*. The moment the time elapsed, and the contract was not performed and house built according to contract, the liability attached for as much as the house wanted of completion, and it can make no difference when the plaintiff completed the house, provided he has so done. *Chace v. Hinman*, 8 Wend. 452. 8 Cowen, 623. 5 Term Rep. 307.

The opinion of the court was delivered by

BENNETT, J. This case having been referred under a general rule of reference, no questions of law are before us, except such as are saved by the referee. The referee finds that there had been a breach of the condition of the bond when the suit was brought, and that Spear was subjected to damages by being compelled to furnish window blinds, and also to get them hung, at an expense of some seventy dollars; but this expense accrued after the suit was commenced. We think these expenses should be included in the assessment of damages, and this is the only question referred to the court. Treating the bond, as a bond of indemnity, it was sufficient to sustain the action, that there had been a breach of its condition, when the action was brought.

It is not material that all the damages should have, in fact, resulted to the plaintiff when he commenced his suit. There can not be successive actions on this bond, and unless the damages could be assessed up to the time of trial, there would be a failure of justice.

Damages on bonds of indemnity are always assessed up to the time of trial. So, in actions on covenants against incumbrances, if the incumbrance is removed between the commencement of the action and the time of trial, the sum paid to remove it, goes to make up a part of the damages, which otherwise might have been merely nominal.

The judgment of the county court is affirmed.

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JACOB & A. D. ROOD v. JOSEPH JOHNSON.

Grant of Water Power. Construction of Deeds. Riparian Proprietors. Mill Owners, Superior and Subordinate rights.

In the construction of instruments or contracts, the first rule to be regarded is to make them speak the intention of the parties, as gathered from the entire transaction. All other rules are subordinate to this one, and when they contravene it are to be disregarded. (See 11 Vt. 588.)

Where the grantor in his deed of a water privilege for a saw-mill, &c., made an exception or reservation of the water, as follows: "except in times of low water, when it is wanted for the carding and cloth dressing, and grist mill," it was held, that the grantee had no right to use the water, when it was wanted for the purposes named in the exception, and that if he used the water, when it was wanted for the carding and cloth dressing, or grist mill, he was liable for the damage occasioned by such use.

The grantor may convey the land and reserve all the water to himself, or he may convey the use of all or a portion of the use of the water in the stream, as a mere incorporeal hereditament, and retain the fee of the land, in himself, notwithstanding the maxim that one cannot convey the water separate from the land.

Reservations of water use in a deed will ordinarily be construed as a reservation of a measure of water, and not for a particular use, and it may therefore be changed or assigned.

The accumulation of a sand-bar in a stream, is ordinarily one of those natural results, which neither party has any right to interfere with, by direct removal. But probably where its accumulation is a common injury to both parties, either would be justified in removing the sand-bar.

The mill owner having the subordinate right must take notice when he is infringing on the right of his superior, and not reduce the water so low as to interfere with that right, and if he does so reduce it, he is liable for all damage sustained by the owner of the superior right, by being delayed for the water to accumulate.

And if the owner of the superior right moves his mill further down the stream, it would not change the relative rights of the parties, as he would then have the right to take as much water as before he so moved his mill.

ACTION on the case. There were two suits, both involving nearly the same question, and both suits were referred to the same referees, under rules of court, who reported substantially the following facts:

That both the plaintiffs and defendant derived titles, upon which their respective claims are based from one George N. Stevens,

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whose title was not questioned by either party. The deed under which defendant claims, is dated the 26th day of March, 1832, and the description of the premises conveyed by said deed is as follows: "Beginning in the channel of Huntington River, on the southerly line of the highway leading across said River, from thence, up said River above the dam, to Jehiel Johns' north line, thence, on said line, northwardly, up the bank to the highway thence, round on the line of said highway to the first mentioned bound, or place of beginning, containing all the land I own on the east side of the River, and within said boundaries, together with the saw-mill standing thereon, together with all the privileges and appurtenances thereto belonging, with the privilege of drawing water to carry said mill, except in times of low water when it is wanted for the carding and cloth dressing, and for the grist-mill; the said Johnson to have the privilege of water to carry a turning-lathe, when it can be spared from the other wheels. The said Joseph to keep a good tight flume, and keep the east end of the dam in good repair, as long as those on the other side shall do the same."

The deed of the plaintiffs was dated the 6th day of November, 1847, and conveyed certain lands, "together with mill-dam and water privileges at the above described premises, excepting the rights and privileges of Joseph Johnson, for a saw-mill and turning-lathe, as deeded to him by me on the 26th day of March, 1832, and the rights and privileges of Alexander Ferguson, as deeded to him by me on the 19th day of March, 1846, for a starch factory, &c."

The deed to said Ferguson conveyed the privilege of water for the purpose of manufacturing starch, and for no other purpose.

That at the time when said Stevens executed his said deed to Johnson, there was standing on the easterly side of the stream, on the premises conveyed to defendant, a saw-mill, and no other machinery. On the other side of the stream, and on the premises subsequently conveyed to said Ferguson and the plaintiffs, there was standing a grist-mill, carding and cloth-dressing machine, which were operated by means of water taken from the same pond, from which defendant was to take water for his saw-mill.

That defendant went into possession at the time of his purchase, and the plaintiffs went into possession in the spring of 1848; and

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that at the time defendant made his purchase, the saw-mill was operated by a flutter wheel, so called, and the gate, which let the water on to said wheel, was eight and one-half feet in length, by five inches wide. That the gate to the grist-mill was eighteen by twenty-two inches—the gate to the carding machine was nine by ten inches—the gate to the fulling-mill was four feet and five inches long, by three and one quarter inches wide.

That at the time the plaintiffs went into possession, the grist-mill and fulling-mill had been taken away, and the starch factory had been erected. The gate to the starch factory was nineteen and one half inches by eleven inches. At the time this suit was commenced the plaintiffs had not erected their new grist-mill, or factory, which is further down the stream than the old grist-mill. The starch factory had been operated for about three months only in each year, commencing generally the latter part of September.

The referees decided that the defendant had no right, under his deed from said Stevens, to use the water in his mill in times of low water, and when the same was wanted by the plaintiffs to run their carding machine on the other side of the stream; and that defendant did, in several instances, in the summer of 1848, use water in times of low water, and when the same was wanted by plaintiffs to run their carding machine, and thereby injured the plaintiffs to the amount of two dollars.

That plaintiffs wanted the water for occasional and temporary purposes, irregularly, as work came in; and the defendant claimed that he was entitled to reasonable notice of the plaintiffs' want of water.

And the referees also found, that on the west side of the stream there was a sand-bar running from near the dam to the bank above the carding-machine flume, so as to prevent the water from running into said flume in sufficient quantities to carry the carding-machine, except when the pond was nearly or quite full, and that in low water, Johnson's flume was so situated that he could draw the water down so that it would not run into the carding machine flume.

They also reported, that on the hearing, the plaintiffs offered the testimony of said Ferguson and Stevens, and that defendant objected on the ground of interest; objection overruled and testimony admitted.

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In the second case, the referees found nearly the same facts; and also that plaintiffs, in 1849, entered the new building further down the stream, and put in operation therein a grist-mill, and some other machinery. That plaintiffs, to get the water on to the wheel in this new building, extended the flume of the old grist-mill and carding machine down to the new building.

The referees also decided in this suit, that defendant had no right to use the water in his mill, in times of low water, and when it was wanted by the plaintiffs to run said carding machine or grist-mill.

And that said defendant did, between the 7th day of March, 1849, and the 5th day of September, 1850, in several instances, use the water, in times of low water, and when the same was wanted by the plaintiffs, to run their carding machine and grist-mill, and thereby injured the plaintiffs to the amount of three dollars.

At the March Term 1853—PIERPOINT, J. presiding—the defendant moved to recommit, and to set aside the report, and also filed exceptions to the report, all which motions and exceptions were overruled, and judgment was rendered on the report for the plaintiffs.

Exceptions by defendant.

Geo. F. Edmunds & A. B. Maynard for defendant.

As there are two causes pending between these parties, involving many of the same questions, and as the first covers most of the grounds of both, we will consider that first; and in the second only such points as are peculiar to that only.

I. The referees having been bound to decide the cases according to law, and having reported the facts, judgment should be entered, as upon a special verdict, for the party prevailing upon the exceptions. *Bishop v. Babcock*, 22 Vt. 295.

II. The deed from Stevens—he being seized of the land on both sides of the stream—to the defendant, conveyed the absolute property in the soil, to the center of the stream, and an absolute equality in the use of the stream, with the additional right to use the whole water in the stream, when it should not be wanted by Stevens for “the carding and cloth dressing, and for the grist-mill.”

1. The land, with its appurtenances, to the center of the stream, was specifically and absolutely conveyed, without, and independent of the additional clause of the deed; and with the land, as a cor-

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poreal hereditament, and as a part of the land itself, the right to the water flowing over it, passed also. *Angel on Watercourses*, chapt. 1, sec. 5. *Starr v. Child*, 20 Wend. 149.

2. So far, then, the defendant had the right to the *equal* use of the water, with Stevens, *at all times*. *Arthur v. Case*, 1 Paige, 447. *Runnells v. Bullen*, 2 N. H. 532.

3. But this right was *only* one of equality. The defendant could not lawfully appropriate the whole water, whether Stevens had occasion to use it or not; the parties, therefore, enlarged the operation of the conveyance, by making it lawful for the defendant to use the *whole* water, except when Stevens should have occasion to use his share. This, we contend, is the plain and manifest meaning of the deed; and it is certainly the only one by which effect can be given to all the words of the instrument. *Ex antecedentibus, et consequentibus fit optima interpretatio*. *Greenleaf's Cruise*, vol. 2 p. 244.

III. If the construction given to the deed, by the plaintiffs, is the true one, it is manifest that the defendant's right to the water is paramount to that of all others, except when the water is wanted, in times of low water, for the "carding, cloth-dressing, and for the grist-mill;" Stevens, therefore, having granted a part of the water for the starch factory, could not be entitled to the first use of the residue, for in that way he could exclude the defendant altogether. The plaintiffs, standing upon Stevens' right, must show affirmatively, that their injury from the want of water for the specified purpose, happened *exclusively* from the act of the defendant. If it was, in fact, occasioned by the starch factory, they cannot complain.

IV. The report shows that plaintiffs suffered a sand-bar to form in the pond at the entrance of their flume, so that the water would not run into their flume in sufficient quantities to run their works, unless the dam was nearly, or quite full, and that the plaintiffs' paramount uses of the water were temporary, and occasional. Under these circumstances, had the plaintiffs a right to blockade their flume, and compel the defendant to stop his works until a large body of water should accumulate, before they would deign to take the spoonful which their temporary necessities might require? It is a cardinal and beneficial rule of law, that a man is bound so to use his own, as not to injure his neighbor. *Rogers v. Bancroft*, 20 Vt. 250. *Angel on Watercourses* § 240 *et seq.*

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V. The lowness of the water alone did not make it the duty of the defendant to desist using it; the plaintiffs must have "wanted" it for a particular purpose, also, before he was bound to suspend. This want, from its very nature, was entirely contingent; and the knowledge of it rested not only peculiarly, but *exclusively* with the plaintiffs; it was *their* want. They were, therefore, bound in justice and in law, to communicate it to the defendant, before they could complain that it was not supplied. Chit. Pl. 288. Tidd's Prac. 440. *Lent v. Paddleford*, 10 Mass. 238. *Smith v. Wright*, 19 Vt. 110. *Jones v. Train*, 11 Vt. 444. 2 Am. L. C. 56-9. *Hatch v. White*, 22 Pick. 518. This last case is identical with the one at bar.

VI. Ferguson was interested in the event of the suit. He was the grantee of a part of the rights of Stevens, and therefore, just as much interested in sustaining them as the plaintiffs themselves. *Jebb v. Povey*, 1 Esp. 679.

As to the second suit: The old grist-mill and fulling-mill having run down and been abandoned, and no similar erection having been put in their place, the right to water in respect to them was lost. The language of the deed binds the parties to the specified uses. Angel on Watercourses, 240 *et seq.*

D. A. Smalley, Phelps & Chittenden for plaintiffs.

I. As Stevens owned the whole privilege, and conveyed the whole to the plaintiffs, except what had been previously conveyed by him to defendant, the only question that arises concerning the right to the water, is as to the extent of the defendant's deed.

On this point, the decision of the referees and the county court was correct.

Stevens had *the right* in his conveyance to the defendant, to reserve as much of the privilege as he pleased.

Nor were any technical words necessary to enable him to do so. It is sufficient if the intent appear upon a fair construction of the language. *Bigelow v. Battle et al.*, 15 Mass. 313. *Hatch v. Dwight*, 17 Mass. 289. *Curtis v. Jackson*, 13 Mass. 507. *Shedd v. Leslie*, 22 Vt. 498.

It is the general rule in this state in the construction of deeds, that the intent of the parties, as apparent from the terms, is to be followed, that general terms are controlled by particular, and

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and that any apparent repugnancy is to be rejected. 6 Vt. 855. 12 Vt. 15. 15 Vt. 479.

Applying these rules to the deeds in question, it clearly gives to the defendant no other right than to use the water for his saw-mill and turning-lathe, when not needed for the plaintiffs' works on the other side.

What might have been the effect of the deed if it had not contained this reservation is a question that does not arise.

II. The referees correctly held, that the change in the plaintiffs' machinery, as it required no more water, did not effect their rights. They owned the water privilege, except the subordinate right granted defendant for a particular purpose, and could of course apply it to any use not injurious to defendant's right. *Bigelow v. Battle*, above cited. *Johnson v. Rand*, 6 N. H. 22. *Alden v. Laoid*, 5 Taunton 454. *Shedd v. Leslie*, 22 Vt. 498.

The defendant having only a subordinate right for a special purpose, is restricted to that purpose, in his use of the water.

III. No notice was necessary from plaintiffs to defendant, when the water became insufficient to carry both mills. It is not required by the conveyance. Having the subordinate right, it is the duty of the defendant to take notice; and the fact was subject to his observation as much as to that of the plaintiffs.

IV. Stevens and Ferguson were properly admitted as witnesses. They had no interest in the suit or its result. Nor could the judgment be used, for or against them in any way.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. In regard to the extent of the grant, in this case, from Stevens to defendant, we have not been able to see that there is really any very great uncertainty. The description of the thing intended to be conveyed, so far as the water right is concerned, is somewhat inartificially drawn. And it is perhaps fairly susceptible of receiving such a construction as to give it somewhat the air of indefiniteness. This is often the case, when we attempt to apply the strict rules of construction to the precise words used, not sufficiently keeping in mind, at the time, the situation of the parties, and the state of the subject matter. Taking all the words of description here used into the account, it is clear something was intended to be excepted from the grant, or in other words, reserved

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to the grantor, which is technically an exception, not a reservation. And this I think is clearly expressed by the words following the word "except" in the deed: "except in times of low water, when "it is wanted for carding and cloth-dressing, and for the grist-mill." When what is wanted? of course the water. Then all the water is reserved, or excepted, which is wanted, in low water, to operate successfully the carding and cloth-dressing business, and the grist-mill. But it may be inquired, when is it low water? Of course it is low water when the defendant's saw-mill does not leave what is excepted from the grant, i. e., what is wanted for the grantors mills already erected. Here is no repugnancy. The land is conveyed, and the grantor might, if he chose, reserve the use of all the water to himself, or he might convey the use of all, or a portion of the use of the water in the stream, as a mere *incorporeal hereditament*, and retain the fee of the land in himself, notwithstanding the maxim that one cannot convey the water separate from the land. But here he chose to convey the land, and the use of the water, he desired, apparently, to restrict, so as not to render his own erections useless, and he adopts a form of expression, as if the conveyance of half the land under the water would not give the use of any water. That might be his view of the law, or it might not. To save all doubt, he says "with the privilege of drawing water to carry said mill." This alone might fairly be construed to carry more than half the water, when needful to carry the saw-mill. But this is restricted by the exception, which obviously was intended to be a reservation out of the whole grant. These words are obviously not the words of a professional scrivener, but of an inexperienced draughtsman, and any attempt to apply to words of this character, the same rules of construction, which strictly professional language might be aided by, will often fail of reaching the cardinal purpose of all rules of construction, the intention of the parties. This case, in principle, and, indeed, in its facts, is strikingly similar to the case of *Gray, admr. v. Clark*, 11 Vt. 583. And if the court should go here again, into an extended examination of the cases upon the subject of exceptions and reservations, which are very numerous, it could answer no good purpose. I have said all, in the case last cited, which I desire to say here. None of the cases read at the bar are as much like the present as the one last nam-

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ed, and no case is authority for another upon a subject of this kind, unless the similarity approaches very nearly to identity.

Mr. Angel's chapter on reservations of water rights in grants of land, shows very fully the soundness of the grounds upon which we here go, and the cases on the subject will be found there collected, and very fairly and fully collated.

II. Upon the principles of the decisions of this court in *Rogers v. Bancroft*, 20 Vt. 250, and *Adams v. Warner*, 23 Vt. 395, it is obvious this reservation of water-right must be regarded as a certain *measure* of water, rather than water for a *particular use*, of course, then, the use of this water might be changed, or assigned, or both. The case of *Pringle v. Taylor* 2 Taunton 150, does not apply to a case of this kind, but only where the reservation is for a particular use, and then only when the use is confined to a particular gauge, which is wantonly destroyed by the owner of the right, thus bringing the case within the principle of loss, by a voluntary confusion of goods, with the fraudulent purpose of gaining an unjust advantage, when it is thereby rendered impracticable to restore the parties to their former state and position. *Pratt v. Bryant*, 20 Vt. 338.

III. The suffering the sand-bar to accumulate is not such an act as would deprive the plaintiffs of their remedy against defendant. It was one of those natural results, which ordinarily neither party has any right to interfere with, by direct removal. The most that could ordinarily be done in regard to alluvion is to use means to guard against its consequences. After it occurs, the rights of the riparian proprietors are fixed by it, and it is not competent for one, who thereby suffers loss, to restore the stream to its former state. 2 Black. Com. 262. Angel on Watercourses, § 55, 56, and cases cited. But if a stream suddenly leaves its bed, which constitutes what the cases call reliction or avulsion, it may be restored. Id. § 57-60, and cases cited. *Woodbury v. Short*, 17 Vt. 387. But in a case like this, very probably either party might be justified in removing the bar, which is a common injury. But as the plaintiffs' right was the dominant one, we do not see how the defendant can complain of the plaintiffs for insisting upon their right, notwithstanding any natural changes in the bed of the stream, so long as the plaintiffs interposed no hindrance in the way of de-

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fendant's removal of the obstruction. He seems to be the party primarily interested in the removal.

IV. In regard to giving the defendant notice of plaintiffs requiring the water, when there was a deficiency, there is no doubt some difficulty, if there really was any such necessity in order to have the defendant made aware of it. But that certainly does not appear by the report, and we ought not to raise any presumptions, either against the judgment below, or the decision of the referees, except where the facts, upon which such presumptions stand, are found. And when the water was drawn out so low, that plaintiffs could not run their machinery, is a matter open to the observation of every one skilled in such matters. The defendant would scarcely need to be told of that. And as the defendant, in common with all others, was bound to know the extent of his right, and that it was subservient to that of the plaintiffs, when the water was so low that the plaintiffs could not run their machinery, he would be bound to take notice of the state of the water, and not to reduce it below that point, or if he did, would be liable to all damages, which plaintiffs sustained by being delayed for it to accumulate, so they could run their mills. It will be borne in mind that if plaintiffs' right is superior, and defendant reduces the water so low as to interfere with that right, giving notice when plaintiffs need to use it, does not relieve the plaintiffs. They are not obliged to wait for the water to accumulate, even one minute; they are entitled to have it always at the proper point when they need it. We do not apprehend, that practically, any difficulty arose on this point. If the parties had understood their rights alike, the matter of notice would have caused no embarrassment we conjecture from the case.

V. No question is made by Mr. Edmunds, in the argument, in regard to the competency of Stevens, as a witness, although that is one exception filed. And very obviously, the counsel judged correctly in not urging it. For Stevens deeded to the plaintiffs, in express terms, all the right he had not already conveyed to Ferguson and the defendant. There could not therefore any liability come upon him to the plaintiffs, on the ground of any recovery, more or less, by the defendant. And Stevens' deed to Ferguson is a mere quit-claim, and of course he took subject to the right of defendant, whose deed was upon the registry of lands. And how Ferguson, whose right was inferior to defendant's, and to plain-

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tiffs', could have any legal interest in a controversy between them, I do not readily perceive. We think no such interest, in the event of this suit, did exist in Ferguson, as to disqualify him as a witness.

VI. The \$2 damages given in the first suit is given for using the water, by defendant's saw-mill, so that plaintiffs could not run their carding machines, and we do not learn from the report, but this use was in the same measure it was, at the time of Stevens' deed to defendant. But the second case, it is claimed does raise the question, whether the plaintiffs have not taken more than they were entitled to, by the reservation in Stevens' deed. But if that were shown, it would not defeat the plaintiffs' right to recover, when the defendants reduced the water so low, as to give them less than they were entitled to, and this is the ground upon which damages are given, in both reports, as we understand. And we do not see why the grist-mill being moved farther down the stream, should deprive the plaintiffs of their right to take, as much water, as before.

Judgment affirmed in both cases.

NOTE.—In *Sumner v. Foster*, 7 Pick. R. 82, it is held expressly, that the mill owner, having the subordinate right, must take notice when he is infringing upon the right of his superior, and is not entitled to notice, and the case of *Hatch v. White*, 22 Pick. 518 has not been regarded, as shaking it, but as decided on its peculiar facts.

WILLIAM D. KIDDER v. RUSSELL J. MORSE.

Petition for a Mandamus, requiring defendant, as Constable, to execute a deed of certain lands, sold by him as Constable, and Collector of Taxes, &c.

It is not necessary that a petition for a mandamus, requiring a constable and collector to execute a deed of land sold by him for taxes, should allege all the particular facts, upon which the writ is claimed, so that the case may be tried upon demurrer, as is common and requisite, in suits according to the course of the common law; if the petition states the right and duty in general terms it is all that is required.

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Nor is it necessary for the petitioner, in this stage of the proceedings, to show that all the previous proceedings have been regular, for it is not competent for the collector to allege his own default, as an excuse for not executing the deed, and the petitioner is not obliged to contest these questions with the collector.

PETITION for a writ of *mandamus*, requiring the defendant, as constable and collector of the town of Bolton, to deed certain lands in Bolton sold by him as constable and collector of said town, to the plaintiff, for delinquent taxes, &c. The facts sufficiently appear in the opinion of the court.

Levi Underwood for plaintiff.

Geo. F. Edmunds for defendant.

The opinion of the court was delivered by

REDFIELD, CH. J. This is a petition for a *mandamus*, requiring defendant to execute a deed of certain lands in Bolton, sold by him, as constable and collector of taxes of that town, to the plaintiff for delinquent taxes, the time of redemption having expired, and said land not being redeemed, said taxes and costs having been paid by plaintiff to the defendant at the time of the sale.

The defendant moves to dismiss the petition, upon the ground that the plaintiff has not alleged with legal precision, all the facts necessary to show that defendant's proceedings, in collecting such taxes were regular, so that the deed would avail the plaintiff, if executed. To this motion to dismiss, we think two answers may be given.

I. The petition does allege most, or all the requisites referred to, in general terms, and we do not consider it necessary that such petition should allege all the particular facts, upon which the writ is claimed, so that the case may be tried upon demurrer, as is common and requisite in suits according to the course of the common law. All that is requisite is, to state the right and duty in general terms. It is objected here, that the petition does not state that defendant was first constable, and the statute requires that the sale of land for taxes should be made by the first constable, even in cases of highway surveyors and school district collectors. But the petition does describe the defendant as "the constable and collec-

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tor of taxes" in said town. And the statute provides in terms, that the first constable "shall be collector of taxes," compiled statutes, 114 § 13, which makes the description, as certain as if the words, "first constable," had been used, since no other constable is collector of taxes. Another objection is, that it does not appear how or by what authority, Morse was authorized to collect said taxes. The averment in the petition is, "said Morse being fully authorized to collect said taxes." This general form of averment is all that is requisite, even where the question is proper to be traversed, and tried upon the hearing.

And most of the formal objections to the mode of alleging the previous proceedings are of this character.

II. But, we do not consider that it is necessary to show that all the previous proceedings have been regular. We think, as the statute in express terms requires, "If the land shall not be redeemed the constable shall execute to the purchaser a deed," that it is not competent for the collector to allege his own default, as an excuse for not executing the deed. Having sold the land to plaintiff, and taken his money, and the land not having been redeemed, he is bound to execute the deed, and let the plaintiff make what he can of it. Although the statute, in terms, provides, "that the deed being acknowledged and recorded shall be sufficient to convey to him a title, against the person for whose tax it was sold," it has been held, by this court, that it does not have that effect, except upon the condition of the irregularity of the previous proceedings. And we do not think he is obliged to contest these questions with the collector, before he is entitled to his deed.

The case of the *People v. the Mayor of New York*, 10 Wendell 393, is a case where the writ was denied, on the ground of the irregularity of the previous proceedings of the collector, but the court put the case expressly upon the ground that the lease in that case, might probably, under the statute of 1816, convey a title without reference to the regularity of the previous proceedings. And they say they are not inclined to exert such a prerogative power, to give strength and validity to a title, which seems clearly defective. What this court might do in such a case, it is not needful to determine here.

The motion to dismiss is overruled.

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WASHINGTON COUNTY MUTUAL INS. CO. v. ELISHA MILLER.

SAME v. WILLIAM H. FRENCH.

SAME v. EDMUND WHITNEY.

Jurisdiction of Justices of the Peace. Appeal. Premium notes to Insurance Companies, how regarded under the Statute.

A premium note to an Insurance Company, in these words, "For value received, in policy No. —, dated the 8th day of January, 1849, issued by the Washington County Mutual Insurance Co., I promise to pay said Company the sum of twenty-one dollars, in such portions and at such time or times as the directors of said Company may, agreeably to their act of incorporation, require," was held to be a promissory note payable by instalments, at the election of the payee, and that it must be regarded as a note for the full amount specified, as much as if it were payable absolutely in instalments.

The final jurisdiction of a justice on such a note must be determined by the amount of the note, without reference to the amount due by the assessment.

ASSUMPSIT on the following note, "For value received in policy No. 41650, dated the 8th day of January, 1849, issued by the Washington County Mutual Insurance Company, I promise to pay said Company the sum of twenty-one dollars in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require. Dated the 3d day of January, 1849.

(Signed) "ELISHA MILLER."

The action was originally brought before a justice of the peace and came to the county court by appeal. It appeared that on the 14th day of January, 1851, the directors of said company, in conformity with their act of incorporation required assessments to be made, in order to meet its losses and expenses, on the written obligations taken from its members, under contracts of insurance similar to defendant's promise, and assessed the defendant \$5,60, on the note above recited, and on the said 14th day of January, 1851, notified the defendant of said assessment and required him to pay it. The plaintiffs claim, in this suit, to recover the assessment and interest.

The suit against French was on a like note dated the 19th day

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of October, 1847, for the sum of \$18,60; the assessment on said note sought to be recovered was \$5,33.

The suit against Whitney was on a like note, dated the 17th day of April, 1850, for \$6,65, assessment \$1,33.

In each of the three cases the *ad damnum* in the writ is \$30, and the cases were appealed by plaintiffs.

The defendant in each case, filed his motion to dismiss the suit and appeal.

The County Court, March Term, 1853,—PECK, J., presiding—rendered judgment on the motion to dismiss, in each case for the defendant, and dismissed the three suits.

Exceptions by plaintiffs.

H. Allen for plaintiffs.

I. The contract described in the plaintiffs' declaration is not a promissory note, for the reason that the obligation to pay any sum depends entirely upon a contingency. Story on Promissory Notes 1 § 1. *Union Turnpike Co. v. Jenkins*, 1 Caine 380. *Cook v. ———*, 6 Cowen 108. *Worden v. Dodge*, 4 Denio 159.

II. If the contract is not a promissory note, the suits are appealable, as the *ad damnum* is more than \$10. Comp. Stat. 239 § 76. *Hill v. Wait*, 5 Vt. 124. *Fuller v. Howard*, 6 Vt. 561. *Church v. Vanduzen*, 4 Vt. 195. The question as to the original jurisdiction of a justice of the peace, and of exclusive jurisdiction are entirely distinct. Comp. Stat. 233 § 20. Comp. Stat. 239 § 76. *Hill v. Wait*, 5 Vt. 124. *Fuller v. Howard*, 6 Vt. 561. *Church v. Vanduzen*, 4 Vt. 195. *Maxfield v. Scott*, 17 Vt. 636. *Bishop et al. v. Warner*, 22 Vt. 591.

III. If these contracts are promissory notes, then the action against Miller is appealable. *Sumner v. Jones*, 24 Vt. 317. *Tyler v. Lathrop*, 5 Vt. 170.

Phelps & Chittenden for defendants.

I. The actions are *upon notes*, not exceeding twenty dollars in each. Such is the form and effect of the contracts declared on. The term "*notes*" is not used in the statute in the commercial, but in the ordinary sense. 7 Vt. 22. 16 Vt. 220. 17 Vt. 549. 19 Vt. 308. 22 Vt. 301. The amount of the note in Miller's case is over twenty dollars. But as by its terms, it is only payable in

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assessments, and as only \$5,60 has been assessed or is demanded in the declaration, the case is within the statute.

II. The *matter in demand* is less than ten dollars in each suit. This distinctly appears from the declarations, as well as from the specifications.

The *ad damnum* being thirty dollars does not alter the case. Where the declaration sets out and limits the claim, that is "the matter in demand." The *ad damnum* can not extend it and does not effect the jurisdiction. *Bishop et al. v. Warner*, 22 Vt. 591. *Thompson v. Colony*, 6 Vt. 9. *Perkins v. Rich*, 12 Vt. 595. *Persons v. Center Turnpike Co.*, 20 Vt. 170.

The opinion of the court was delivered by

REDFIELD, CH. J. These are suits upon premium notes executed to the plaintiffs by members of the company, who have taken policies of insurance of the company. The first premium note is for \$21, and the assessment is \$5,60. The second note is for \$18,60, and the assessment \$5,83. In the third case the note is for \$6,65, and the assessment is \$1,88. The suits are brought to recover only the assessment of course. In each case the *ad damnum* in the writ is \$30

Under the decisions in this state, since the case of *Hill v. Wait*, 5 Vt. 124, which have uniformly followed that case, it would follow, that if the contracts sued in these cases are not notes they were all appealable. The rule there laid down is, "To give a justice exclusive jurisdiction, the *ad damnum* must not be laid over, nor the sum in demand appear, from the declaration, specification, or exhibit of the plaintiff to be more than ten dollars." That very action was upon a claim as definite as these claims are, and which so appeared by the declaration, and was below \$10, clearly and obviously, in every possible view. Still, as the plaintiff had put his *ad damnum* at \$20, the court held the case to be appealable, thus giving the plaintiff the option in the class of claims, which are not notes or settled accounts, and are below \$10 to make them final, or appealable, by the *ad damnum* in his writ. This is different, be sure, from the rule established in certain classes of contracts, in regard to the extent of justice jurisdiction. In these cases, if the claim is of a fixed character, and the amount due appears upon the claim, as a bond or judgment, the limits of jus-

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tice and county court jurisdiction cannot be varied by the *ad damnum* merely. *Southwick et al. v. Merrill* 2 Vt. 320. But in regard to the final jurisdiction of a justice the rule is clearly otherwise.

And the Revised Statutes have not altered the rule in this respect. The terms used are more specific and definite in expressing the rule than was that of 1821. The Revised Statutes and Compiled Statutes also, use the very words "*ad damnum*" in the plaintiffs' writ, with the other terms found in the opinion of the court in *Hill v. Wait*. The present statute is an enactment of the decisions of the court upon this subject, under the former statute, and is as specific and explicit, as words can be. There is no room left for construction upon the subject. If the *ad damnum* is more than \$10, the case is appealable, unless it is a note or settled account. But the *ad damnum* being less than \$10, does not necessarily make the case final. If the declaration or specification of the claim show it to be more than \$10, that too will make the case appealable.

It remains then to inquire whether these suits are upon notes, within the meaning of the statute. It is not claimed that these contracts are in the commercial sense promissory notes. There is no doubt a degree of contingency about these contracts, which would have destroyed their negotiability, if they had been made payable to order, or bearer. So that they would not be in the common law sense promissory notes probably. But in this State, as will appear, by our Reports, we have regarded a great variety of contracts, which are mainly in the form of promissory notes, as such for many purposes, although deficient in some of the common law requisites of that class of contracts, such for instance as notes not payable in money, and notes payable, more or less, upon contingency. The latter class of contracts, if made in the general form of a promissory note, are allowed to be declared upon, as importing a consideration. And it is probable, that in this statute, and some others the expression "note" is used to include more than strictly promissory notes. And we incline to the opinion, that these contracts, although depending somewhat upon contingency, for their ultimate payment, both as to the time, and the amount, must still be regarded as notes, within this statute. They are in the general form of a promissory note. Setting forth in

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what the value received consists is well enough in a promissory note in strict commercial usage. These notes contain an absolute promise to pay to the company the several amounts specified at such time or times as the directors may (agreeably to their act of incorporation).require. This is in terms a promise to pay on demand. We cannot know judicially, that the directors of this company cannot assess the full amount of their premium notes at once. And I presume the fact is, that if they should assess the whole amount, it might not be very easy to resist paying it in a suit at law. And it is of course supposable that they may need the whole amount. Such contingencies have happened to some companies, and may again. And in this case, so far as we can perceive, it depends upon the mere discretion of the directors of the company, how much, and at what times, they will require payment. The notes, in terms, only make the contingency one of time. And in the case of the *Goshen Turnpike Co. v. Hustin*, 9 Johns. 217, a note to the company for stock, "payable in such manner and proportion, and at such times and places, as the President, Directors, and Co., should from time to time require," was held a cash note, within the statute, and negotiable, thus virtually overruling the case of the *Union Turnpike Co. v. Jenkins*, 1 Caines 381, which was relied upon by plaintiffs in the argument, and which in fact seemed to me very much in point. But I am satisfied, that the case in 9 Johns. is more consonant to the spirit and reason of the thing, as it is regarded in this state, certainly. But I should certainly doubt the full extent to which the case goes in considering the note as negotiable. But that it is a note, according to the immemorial usage in this state there can be no question.

And if a note, it is one for the amount specified. If it is not a note till the assessment, it is not one at all. It is, in that view, a promise to pay the assessments merely; and is no more a promissory note than the policy, which contains probably the same undertaking, and is a simple contract. But we think this is, at least a note, payable by instalments, at the election of the payee, on a discretion, and must therefore be regarded as a note for the full amount expressed, as much as if it were payable absolutely in instalments. In such case, if the instalment was below \$100, it might probably be sued before a justice, by alleging that fact in the declaration, although the present statute is not so favorable to

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such a view on this point, as the former statute was. But in regard to the final jurisdiction of a justice, it is determined by the amount of the note, without reference to the amount due. And as in passing upon one instalment, the validity of the whole note might come in question and be determined, we should not deem it expedient to render the justice's judgment final by construction merely.

The result is, that in the case of Miller the justice's judgment was not final, and the judgment of the county court dismissing the appeal, is reversed and the case remanded, and in the other cases the judgments are affirmed.

NOTE.—I find that the case of *Union Turnpike Co. v. Jenkins*, upon which the plaintiffs rely, was reversed in the court of errors in *Jenkins v. U. T. Co.*, 1 Caines cases in Errors 86. So that the law of New York, with reference to which place this contract was executed probably, is that such a note is a cash note and negotiable by the law merchant.

JOHN, JOHN H., CASSIUS & EDWARD W. PECK v. JOSEPH H. WALTON.

[IN CHANCERY.]

The rights of married women. The Statute of 1847, (Comp. Stat. 408 § 15,) discussed and considered; and held constitutional.

The statute in relation to the rights of married women, (Comp. Stat. 408 § 15,) provides that, "The rents, issues and profits of the real estate of any married woman, and the interest of her husband in her right in any real estate, which "belonged to her before marriage, or which she may have acquired by gift, "grant, devise or inheritance, during coverture, shall during coverture, be exempt from attachment or levy of execution for the sole debts of her husband; "and no conveyance made during coverture, by such husband, of such rents, "issues, and profits, or of any interest in such real estate shall be valid, unless "the same be by deed, executed by the wife jointly with the husband and acknowledged by her, &c." It was held that this statute embraces all the rights in real estate which the wife shall acquire during coverture, as well as the rights in real estate, acquired by her before marriage. And it was also held that the word "grant" applies to all conveyances by deed, which are not gifts.

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Held also that the statute applies to all future conveyances made by the husband, whether the coverture existed at the date of the statute or not.

Held also, that the statute cannot be regarded as having deprived the husband of any rights, which were not clearly subject to the control of the legislature; and that the legislature may at all times prescribe the mode of conveying property, and especially real property.

And where the statute declares certain conveyances of the husband's interest in the wife's land, as invalid unless the wife join, and the objection is brought to the notice of the court even by the husband himself, this court cannot pronounce a decree based upon the validity of such conveyance.

APPEAL from the Court of Chancery.

This was a bill of foreclosure predicated upon a mortgage, executed by the defendant, of land the fee of which was in the wife of defendant, she not having joined with her husband in the deed. The defendant executed the mortgage since the statute of November, 1847.

W. W. Peck for plaintiffs.

I. The act of 1847, (Comp. Stat. 403 § 15,) is void, as impairing the obligation of the marriage contract. Defendant had acquired an absolute estate in the premises during coverture, which had become a complete estate by the courtesy, or contained the incidental right of such an estate. This estate was derived by the contract of marriage. The effect of the act of 1847, if it in terms embraces prior marriages, exempts the land from the contract and thus impairs the obligation of the wife under it. *Sturges v. Crowninshield*, 4 Wheaton 197. *Ogden v. Saunders*, 12 Wheaton 281. *Brunswick v. Litchfield*, 2 Greenleaf 28.

II. If the act, treated as embracing cases of prior marriage, is not void, it is to be construed as prospective only. Unless the intent to *retroact* is clear, a statute will not receive such a construction, however explicit may be the terms. If the intent appears only from the letter, it will be controlled by the general presumption, if it is susceptible of a future operation.

1. The expression "sole debts," means his debts incurred before marriage, else the estate would during coverture be exempt from her debts incurred before marriage, and from his incurred during coverture. In the former case the reason for charging him with

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her debts would be violated ; in the latter, creditors would be deceived.

2. If this expression is to be taken literally, the statute is to be construed as not operating on a prior marriage, so as to affect a conveyance by the husband of his interest. 1 Kent's Com. 454-5 -6. *Lowry v. Keyes*, 14 Vt. 14. *Briggs v. Hubbard*, 19 Vt. 86. *Dash v. VanKleeck*, 7 Johns. 477.

III. The act, as an exemption act, is to be construed strictly. *R—— v. Alton*, 5 Denio 119. The premises are not within the class specified for exemption. They were not acquired by *gift, grant, devise, or inheritance*. Grant is a conveyance of incorporeal hereditaments alone. 2 Bl. Com. 317, 4 Greenleaf's Cruise 51.

L. B. Englesby for defendant.

1. The act only increases the solemnities requisite to a valid conveyance of this class of real estate, and its operation is not to divest the husband of any rights he may have acquired previously to its passage, but only limits the exercise of them, and should be sustained against a conveyance of this character. Comp. Stat. 403 § 15.

II. The bill does not show that the defendant had issue born alive previous to the passage of the act of 1847, and if not, and such does not appear to be the fact, the court could not grant the complainants any relief against the defendant as tenant by the courtesy, even if they should be of opinion that he had any interest in the land to convey by this conveyance.

The estate did not vest in defendant at the time of marriage, but was acquired subsequent.

The rights of the plaintiffs were acquired subsequent to the passage of the act, with knowledge of it, and their rights must be subject to the provisions of it.

This act is similar to numerous other acts, whose constitutionality has never been questioned, exempting portions of property from attachment.

The opinion of the court was delivered by

REDFIELD, CH. J. This is a bill to foreclose a mortgage upon land, in which the wife held the estate in fee, and the husband an estate by the coverture; the mortgage being executed by the

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husband alone, since the statute of the 15th November, 1847.

The statute in terms requires that in order to convey "the rents, issues, and profits (of) or any interest the husband may have in the real estate of the wife, which belonged to her before her marriage, or which she may have acquired, by gift, grant, devise, or inheritance during coverture, the deed shall be executed by the wife jointly with the husband and acknowledged by her," &c. The words of the statute are "no conveyance made, during coverture, by such husband shall be valid," unless executed as above.

I. It is urged that it does not appear in this case, that the mode of conveyance to the wife was such, as comes within the statute. But it might be replied to this, that the bill does not allege that the conveyance to the wife was made since the coverture, and as in pleadings presumptions resting upon equal force are to be determined against the pleader, we should conclude the conveyance was before the coverture, and that the land "belonged to her before marriage." But aside from this uncertainty, upon the face of the bill, we think it very apparent the statute was intended to embrace all rights in real estate, which the wife shall acquire during coverture. It would be a very nice, and as it seems to me, a very unintelligible construction to give the words of the statute, to limit the word "grant," to its narrowest technical import. It evidently was intended to apply to all conveyances by deed, which were not gifts.

II. It is urged, that as the words of the statute are general, the court should not give them a retrospective operation. That is no doubt, in general, a sound rule of construction, upon the ground, that it is not to be presumed the legislature intend to pass laws, affecting the force and validity of contracts, already in existence. This would have a very ready and natural application to this statute, so far as the class of contracts, directly named in the statute, is concerned. The words of the statute are "no conveyance made during coverture," without specifying whether made before or after the passing of the statute. But we should undoubtedly imply that the statute only applied to contracts or conveyances thereafter executed. The statute, had it in express terms extended to conveyances before made, would have been, so far, ineffectual, on account of its conflict with the United States constitution, restricting the states from passing laws impairing the obligation of con-

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tracts. So too where the creditor's debt exists before the passing of the law, it is very probable he might be regarded, as having such an interest, in his debtors property, as a mode of collecting his debt by attachment and levy, that a statute depriving him of such right might be regarded, as an infringement of the contract. The New York courts have made some decisions upon this point, which have not been shown to the court, during the argument, and I would not undertake to state them from recollection. But we think this statute was intended to apply to all future conveyances made by the husband, whether the coverture existed at the date of the statute or not.

III. But it is claimed, that if the statute was intended to have this operation, it must be regarded as ineffectual, so far as married relations existed, at the date of the statute. To this it may be said, that a subsequent creditor acquires no such interest in the husband's vested rights in his wife's property, or future acquisitions, as to enable him to assert them, on behalf of the husband, or to base any rights of his own upon them. It is certainly not ordinarily true, that when one's incidental rights, in a subject matter of property even, are violated by a statute, in some particular, to which the party affected does not object, that creditors subsequent to the passing of the statute, can assert his rights in spite of him.

But we do not regard this statute as having deprived the husband of any rights, which were not clearly subject to the control of the legislature. The husband is not in any sense deprived of the estate, which he might have in any of his wife's property, or of the right to any estate in her prospective acquisitions. The statute only provides a special mode of conveying this particular estate. And of this no man can complain. The legislature may at all times prescribe the mode of conveying property, and especially real property. And whether they apply this provision to all estates, or only to particular estates, is of no importance. If the legislature should provide that no man should convey his real estate unless all his heirs capable of inheriting the estate joined in the conveyance, it does not occur to us that the statute could be regarded as void. If the subject matter is fairly within the range of legislative cognizance, a statute cannot be held void, on account of its apparent inutility, or indeed its positive absurdity. But we do not regard this statute, as coming under either of these

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categories. The marriage relation is an important element in all political organizations, and as such has been regarded generally, in Protestant countries, as chiefly under the control of the legislative power, certainly so far as mere rights of property are concerned it ought to be so.

And where the statute declares certain conveyances of the husband's interest in the wife's land as invalid unless the wife join, and the objection is brought to the notice of the court even by the husband himself, we do not see how we could pronounce a decree based upon the validity of such conveyance.

The decree of the chancellor is affirmed.

MORTON COLE v. CHAMPLAIN TRANSPORTATION CO.

Book Account. Contract. Payment.

When a certain sum of money is offered by a debtor to his creditor, in payment of a certain bill or account, and the debtor leaves that sum of money and a receipt in full for said account, in the hands of a third person, directing him, in the presence and hearing of the creditor, to deliver the money to the creditor, if he will sign the receipt in full, if not to keep and return the money, and the creditor after the debtor leaves, takes and counts the money, and then refuses to return the money or to sign the receipt, this operates as a full payment or discharge of said bill or account, notwithstanding the creditor declares at the time, that he does not accept the money in full payment of the bill. The same doctrine held in *McGlynn v. Billings*, 16 Vt. 329.

One, who had contracted for a quantity of wood, and received the wood, and used it mostly without objection, and then paid for most of it without objection, would after this be precluded from raising either the question of fraud or breach of warranty.

And where the defendants bought a quantity of wood of the plaintiff, which, by the terms of their written contract, was to be placed upon the lake shore and measured by one Boardman, it was held, that if the plaintiff properly placed the wood upon the shore, under the contract, it was a waiver of the condition, in the contract, that the wood should be measured and surveyed by B., when the defendants, by their agents, removed and used it.

It was also held, that if defendants did not intend to pay for the wood thus placed there under the contract, on the ground that the quality of the wood was infe-

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rior to the plaintiff's representations, or for other reasons, it was the business of the defendants to see to it, that their servants did not remove and use it, and that after having allowed them to do so, the defendants must pay for it.

BOOK ACCOUNT. The auditor reported, that in the month of June, 1851, the plaintiff was the owner of a large quantity of wood, then cut and lying on Valcours Island in Lake Champlain. That part of said wood was piled on the east shore of the island on Sloop Bay, so called, and part on the west shore, and a part in the wood and pasture of said island.

That sometime in the month of said June, the plaintiff, and one Oscar A. Burton, the president of the said Champlain Transportation Co., in whose behalf he acts in the transactions herein detailed, and Cyrus Boardman, then in the employ of the said company, and their general wood measurer, met together on said island, and had a conversation about the purchase of said wood by said company. Burton and Boardman then examined the wood on the east side of said island fully; that on the west side not so fully, as some six or eight of the piles were so near together that only the ends and tops of the inside piles could be fully seen without opening them; at this time no contract or purchase was made. That subsequent to this time and prior to the 14th day of July, 1851, the plaintiff took away two sloop-loads of this wood, one of which was on said 14th day of July, at the wharf in Burlington, partly on the wharf, and partly on the boat, and the plaintiff and said Burton again came together and went on to the wharf and boat where said wood then was, and said Burton agreed to take said boat-load of wood at \$1,50 per cord, and freight at sixty-two and one-half cents per cord, and said Burton directed the captain of the boat to reload the wood, and take it to Shelburne Harbor, there to be measured by one Root; this was done, and it amounted to 84 cords and 88 feet.

On the said 14th day of July, 1851, the plaintiff sold said Burton a quantity of wood on said island; the contract was in writing, and signed by plaintiff and said Burton; and the quantity in said contract estimated at ten or twelve hundred cords, and described as the same inspected by said Burton and Boardman, some weeks before. The wood was to be measured within a week by said Boardman, and that he might reject two hundred cords of the poorest culled wood, and for the balance said Burton was to pay one dollar and fifty cents per cord. It was also agreed that the

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plaintiff might deliver some two or three hundred cords more, out of what the plaintiff had cut, at the same place, and to be of as good quality, said Boardman to be the judge; the wood to be taken away that fall or the next season, as said Burton might elect, and to be paid for when the plaintiff asks, if measured. The wood bought was on Sloop Bay, and the two or three hundred cords named, to be delivered there, if plaintiff elected to deliver it, in addition to the first quantity named.

That the said wood was not measured within the week specified in the said contract, but was postponed, for the accommodation of one party and the other, until the 8th day of August 1851, when said plaintiff and Boardman went on to the island, and measured the wood. The plaintiff claimed that the length was not to be measured, but by the contract to be taken at four feet. But said Boardman measured and adjudged the wood to be three feet and nine inches in length, and computing it at that length, the amount measured and accepted under the contract was 804 cords and 112 feet; calling the length four feet, as claimed by the plaintiff, it amounted to 858 cords and 88 feet. Boardman also measured the wood rejected under the contract as culled wood, and the amount was 184 cords and 50 feet, he also, as part of the 804 cords and 112 feet, accepted and measured 68 cords and 36 feet in the pasture, which the plaintiff agreed to draw to the shore, so that it could be hauled away.

The plaintiff also drew from the woods 93 cords and 118 feet of wood, which had not been measured or seen by Boardman or Burton; this wood was of the same quality, as that seen by said Boardman and Burton, when on said island. It was drawn at the same time that the 68 cords were drawn from the pasture, and mixed with it, so that the two could not be distinguished.

The said 93 cords were measured by the plaintiff's men and the boatmen of the defendants, and this wood was taken away by the boatmen in defendants' employ and used by the defendants: but neither the defendants or Burton, or Boardman had any knowledge of this, nor had Boardman been ever called upon to measure or judge of the quality of the wood.

That in October, 1851, the plaintiff and said Burton had a conversation about the purchase for defendants, of the 184 cords and 50 feet of the culled or rejected wood, in which Burton understood

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plaintiff as selling him the culled wood at $87\frac{1}{2}$ cents per cord; but on their coming together some eight days after, it appeared that there was a misunderstanding in regard to it, and the trade was abandoned. In the mean time Burton had directed the boatmen to take both the accepted and rejected wood, and under these directions, they had taken away about 60 cords of the culled wood; and that the boatmen of the defendants, had by mistake or otherwise, but without the knowledge of defendants or Burton, taken quantities of the said culled wood, making in the whole of rejected or culled wood taken by defendants, and used by them, about 100 cords.

That the defendants continued to take away the wood, by their boatmen, until sometime in the spring or summer of 1852, when said Burton directed the boatmen not to take away any more of the wood, claiming that the wood was not of as good quality as it was represented to be by the plaintiff, when he purchased it; but did not say anything to the plaintiff on the subject of the quality, or that he had refused to take any more of the wood. At the time Burton gave these directions to the boatmen, there was remaining on said island, of the wood that said Boardman had measured, as aforesaid, about 200 cords, including the balance of the culled wood, after deducting the 100 cords taken away by defendants, as aforesaid.

That after the wood was measured by said Boardman, on the said 8th day of August, 1851, the plaintiff called upon said Burton several times for the pay for the wood; Burton expressed a willingness to pay for the 804 cords and 112 feet, as measured by said Boardman, calling the length three feet and nine inches, but plaintiff declined receiving it, except as for the 858 cords and 88 feet, claiming that as the measurement.

That on the second day of September, 1851, the plaintiff and said Burton, met in Burlington in the room of Judge Noyes, and Burton then made a statement of the account, with a receipt in full, and produced a sum of money and his check, amounting to \$1207,40, which money plaintiff proceeded to count. While plaintiff was counting the money, said Burton was called, and informed that the steamboat was about leaving. He then handed plaintiff the account and receipt, and asked him to sign the receipt. The plaintiff said it was time enough to sign the receipt after he had

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counted the money. Burton then told Judge Noyes, in the presence and hearing of the plaintiff, to take charge of the money, and if the plaintiff signed the receipt to let him have the money, if not to keep the money, and return it to him. Burton then left for the steamboat. The plaintiff and Judge Noyes continued counting the money, until they were satisfied as to the amount, and Judge Noyes then asked the plaintiff to sign the receipt, written by said Burton. The plaintiff examined the statement and receipt, and refused to sign it, claiming that there was more due him, and that he would not sign a receipt in full; said that he ought to have interest. The plaintiff then wrote a receipt for the money, and offered it to Judge Noyes; but Noyes refused to accept the receipt, and called upon the plaintiff to give him the money, that he might return it to said Burton; plaintiff refused to return the money, or sign the receipt, and took the money away with him. That plaintiff understood that said Burton did not intend that he should take the money away without signing the receipt.

Defendants contended that plaintiff had no right to deliver any wood on the lake shore, under said contract, after said wood was measured by said Boardman, on said 8th day of August, 1851, and that said 93 cords and 118 feet, charged in the account could not be recovered for, in this action.

The auditor decided that defendants are liable for said wood and allowed the 93 cords and 118 feet at \$1,50 per cord, amounting to \$140,89, and interest thereon.

The auditor also decided that the true amount of wood measured on said 8th day of August, 1851, was 804 cords and 112 feet, and that the defendants are liable for that amount, at \$1,50 per cord, amounting to \$1207,40, and interest thereon, from the said 8th day of August.

The charge for the 84 cords and 88 feet of wood delivered at Shelburne Harbor, the auditor allowed at \$1,50 per cord, making \$126,42, and the freight thereon, \$52,68, and interest from the 14th day of July, 1851.

The amount of culled wood measured by said Boardman, the auditor found to be 184 cords and 40 feet, and that of this, the defendants took and used 100 cords, as above stated.

The defendants claimed that they were not liable for this wood in this form of action; and plaintiff claimed under the facts stated

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that defendants were liable for the whole 184 cords and 40 feet at \$1,50 per cord. The auditor decided that defendants are liable for the 100 cords taken and used for what it was worth, and that its value was $87\frac{1}{2}$ cents per cord, and allowed 100 cords of culled wood at \$87,50, and interest from the first day of November, 1851.

1851. Nov. 1, 98 cords and 118 ft. of wood at \$1,50	140,89
“ Int. from Nov. 1, 1851 to 22 March, 1853	11,76
“ Aug. 8, 804 cords and 112 ft. wood at \$1,50	1207,40
“ Int. from 8 Aug., 1851 to 22 March, 1853	114,69
July 14, 84 cords 38 ft. wood at \$1,50	126,42
“ “ Freight on same	52,62
Int. from July 14, 1851 to 22 March 1853	18,12
“ Nov. 1, 100 cords culled wood at $87\frac{1}{2}$ cts.	87,50
Int. from Nov. 1, 1851 to 22 March, 1853	7,29
	<hr/>
	\$1766,69

1851. Sept. 2, cash paid Cole by Burton	1207,40
Int. from Sept. 2, 1851, to March 22, 1853	112,68
“ Oct. 25, cash paid Cole by Burton	100,00
Int. from Oct. 25, 1851 to 22 March, 1853	8,92
	<hr/>
	\$1429,00

Balance in favor of plaintiff	\$337,69
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The balance of the plaintiff's claim found by the auditor was \$337,69, as above stated, and the auditor disallowed the plaintiff's claims, except as above stated.

The defendants filed exceptions to the report.

The county court, March Term, 1853,—PECK, J. presiding,—overruled the exceptions, and rendered judgment for plaintiff, agreeably to the auditor's report. To which defendants excepted.

D. A. Smalley and Phelps & Chittenden for defendants.

Underwood & Hard for plaintiff.

BY THE COURT. In this case we are inclined to hold, that according to the case of *Mc Glynn v. Billings*, 16 Vt. 329, the plaintiff was bound to consider the money, which he received, in full of the bill upon which Burton offered to pay it. It may sometimes

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happen that parties may differ, as to whether a certain amount paid is to be received in full of a certain claim, and it may be difficult to determine whether the one or the other party may not have yielded more or less, from their original pretensions ; but here there is no reason to raise any question. And as the money did pay the principal, we think very obviously the plaintiff, under the circumstances, cannot now claim a balance of interest, which the auditor has allowed him of \$2,01, which must be deducted.

II. As to the evidence to show the quality of the wood inferior to plaintiff's representation, there seems to be two answers.

1. It is not said it was offered to show that the representation was fraudulently made by plaintiff. And treating it as a virtual warranty, and we do not perceive any other view with which it could be offered, such evidence would be to control the written contract, made at the time.

2. The defendants having received the wood, and used it mostly without objection, and then paid for most of it without objection, it would, in any view, be quite too late to raise any question, either of fraud or breach of warranty.

3. As to the ninety-three cords, it came within the written contract, and we do not think the report states any such bad faith or negligence on the part of plaintiff, or his servants, in commingling it with the wood already measured, as to fairly subject the plaintiff to the loss of the wood. And we do not understand by the report, that any portion of the wood formerly measured by Boardman, went to make up this ninety-three cords, but the contrary.

If then the plaintiff properly placed it upon the shore, under the contract, it was a waiver of the condition in the contract, that the wood should be measured and surveyed by B. when the defendants, by their agents, removed it and used it. And if this was done by such agents as they employed to run their boats, and carry wood, and build fires, it will bind them under the circumstances of this case, whether they were boatmen or directors. It was the business of the directors, if they did not intend to pay for the wood, thus placed there under the contract, to see to it, that their workmen did not remove it, and use it, and after having allowed them to do that, the company must pay for it.

4. The same principle will apply to the culled wood. Sixty cords were taken by direction of Burton, while he understood he

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was acting under a contract of purchase at 87½ cts., and the other forty by the same workmen, it would seem, before they were made to comprehend the revocation of the first order; so that the whole one hundred cords may fairly be regarded as taken by direction of Burton, upon the same expectation, and the auditor very properly regarded the plaintiff, by charging it on book, as having virtually acceded to the contract, which Burton claimed, and has charged the defendants, with the wood, at the price Burton understood he was to have it for.

5. In regard to the wood carried to Shelburne, we do not see any possible question. It was received, used and measured by the very man who was to measure it.

Judgment reversed, and judgment on the report for the sum reported deducting \$2.01 and adding interest since the judgment in the County Court.

A. B. MAYNARD AND G. F. EDMUNDS v. WM. P. BRIGGS.

Book Account. Parties. Attornies. Negligence.

Where M. was retained, as counsel in certain suits, by the defendant, before M. formed a partnership with E., and the services were performed by M. & E. after the partnership, and this was all known to the defendant, *it was held* that M. & E. could recover for the services thus rendered, in a joint action against the defendant.

Suits may always be brought, either in the name of the parties with whom the contract is made, or in the name of those legally interested, at the election of the plaintiff, when the defendant will not be embarrassed or in any way injured by such election of the plaintiff.

Where the defendant complained of negligence on the part of the plaintiffs, who were attornies, in the management of a suit, in which he had employed them, *it was held*, that negligence should have been distinctly found by the auditor, to deprive the plaintiffs of all recovery for services in the suit.

BOOK ACCOUNT. The auditor reported, among other things, that the partnership of Maynard and Edmunds was formed in April, 1849, and continued until the 20th day of November, 1851;

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and that said Maynard was employed and engaged in two of the suits by Briggs, the defendant, before the said partnership was formed. The defendant insisted that the plaintiffs could not recover in this action for services in said two suits, but that the action must be in the name of Maynard alone. That Briggs knew of the existence of the said partnership, and of the fact of Edmunds' connection with said suits, and of his making preparation for trial in one of the suits, and of his attending to one of them to its final termination; and that he made no objection, and said nothing to Maynard or Edmunds after they became partners, that either Maynard, or Maynard and Edmunds were no longer to be connected with said suits as his attorney or attorneys.

That the defendant also insisted that plaintiffs were not entitled to recover for services in a suit *Briggs v. Keyes*, on account of negligence in attending to the same, so that Keyes obtained a judgment in said suit.

That it appeared that said suit was commenced before a justice, and appealed, by said Keyes, to the September term of Chittenden County Court, 1851, and that an auditor was appointed that term, and that plaintiffs charged \$5,00 for their services that term. That the next March term, 1852, Edmunds discovered upon the calling of the docket, that judgment had been rendered on the report, for Keyes. Mr. Edmunds, then in court, examined the rule and found that legal notice had been given to Briggs of the hearing before the auditor. That it also appeared, that the service was made by leaving a copy at the dwelling-house of said Briggs, and that he was away at the time and did not return until after the hearing before the auditor; and that the plaintiffs had no notice of the service on Briggs, or of the audit until said March term, 1852.

The auditor allowed the said charge of the plaintiffs. The auditor found a balance due plaintiffs, if they were entitled to recover in this action for services in said two suits first named, of \$88,30. But if the court should be of opinion that plaintiffs cannot recover in this action for the services in said suits, then auditor found balance due plaintiffs, to be \$88,92.

The County Court, March Term, 1853,—PECK, J., presiding,—rendered judgment on the report for the plaintiffs to recover the largest sum reported.

Exceptions by defendant.

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The opinion of the court was delivered by

REDFIELD, CH. J. I. The defendant objects to the plaintiffs recovering in a joint action for services rendered in his suit, while they were in partnership, and this known to the defendant, at the time the services were rendered, on the ground that the defendant retained plaintiff, Maynard, in the suits before he formed the partnership with the other plaintiff. Nothing is stated by the auditor to show that the defendant will be embarrassed in his defence, or in any way injuriously affected by the suit being brought in the name of the two plaintiffs. And where that is not the case, the suit may always be brought, either in the name of the parties with whom the contract is made, or in the name of those legally interested at the election of the plaintiff. This is the law, in regard to dormant partners, and factors doing business in their own names. *Lapham v. Green*, 9 Vt. 407. *Wait v. Johnson*, 24 Vt. 112. Under the circumstances of this case, it is questionable, I think, whether the plaintiff, Maynard, if objection had been made by defendant, could have sustained an action in his own name alone, for the services performed by the partnership which seems to have been open, and known to the defendant.

II. The auditor does not seem to have found any such negligence in the Keyes suit, at the final term, as will justify this court, as it seems to us, in saying the plaintiffs are precluded from recovering for their services, at the former terms, when no negligence is complained of. If they were guilty of neglect, at the last term, they will still remain liable, and that should certainly have been distinctly found by the auditor, to deprive them of all recovery for services in the suit.

III. In regard to the \$3 term fee charged the defendant for attending his suits, it is certainly not an uncommon charge, and was never regarded as exorbitant, to my knowledge. The statute limiting the taxable costs of the party to travel and \$2 term fee, would not control a charge between attorney and client. The practice of charging \$3 probably grew out of the practice of taxing \$2 term, and then travel for parties residing more than twenty miles from court, and who did not attend court.

That a dormant partner even, which Mr. Edmunds in this case is not, may join or not, at the election of the plaintiffs, is an universally recognized rule, in the English courts, at this day, and so

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laid down in all the elementary writers upon this subject, and is distinctly put forth, as a basis of decision, by this court. See *Hiliker v. Loop*, 5 Vt. 116. In *Lapham v. Green*, 9 Vt. 407, and virtually in *Morton v. Webb*, 7 Vt. 123. Collyer on Part. 539.

Judgment affirmed.

S. WIRES AND W. W. PECK v. NAOMI GRISWOLD & TRUSTEES.

Trustee Process. Service of the writ upon trustee and principal defendant. Abatement.

Where the writ in a trustee process, was served on the principal defendant, a resident of Addison County, by a deputy sheriff of Washington County, who had served said writ on the trustee, a resident of Washington County, this service on the principal defendant, was held defective, under our present statute, (Comp. Stat. 257 § 10,) which provides, "that if the goods or estate of the principal defendant, in his own hands and possession, are attached, the writ shall "be served on the principal defendant in the same manner as an ordinary writ of "attachment, otherwise it shall be served on him as a writ of summons."

The case of *Corey v. Gale*, 13 Vt. 639, can have no application to our present statute, as that case was decided under the act of 1835, which provided that the same officer who served the writ on the trustees, should also leave a copy with the principal debtors.

The objections taken to the plea in abatement, that it set forth matter *dehors* the writ, and that it should not have commenced with a prayer of judgment, overruled on the authority of the case of *Gray v. Flowers*, 24 Vt. 533.

TRUSTEE PROCESS. This was an action of *assumpsit*, the writ was returnable to the March term, 1852, of Chittenden County court, and set up the plaintiffs residing in Burlington in said county, and the principal defendant as residing in Ferrisburgh, in the county of Addison. The officer's return on the said writ was as follows :

"*Washington County ss.*

MONTPELIER, February 2d, 1852.

"I then served this writ on the within named Vermont Mutual

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"Insurance Company, as Trustee, by leaving with Charles Dewey, clerk of said company, a true and attested copy of the original writ and of my return hereon thereon endorsed. And on the 8th day of March, A. D. 1852, I gave the within named Naomi Griswold, in Ferrisburgh, in the county of Addison, a true and attested copy of the original writ, and of my return hereon thereon endorsed.

(Signed,) "Attest. HOLDEN PUTNAM 2D, D. Sheriff."

The defendant filed her plea in abatement, for want of legal service of the writ on the principal defendant. The plaintiffs replied, and insisted that there was due and legal service of said writ upon her, the defendant. To the replication of the plaintiffs, the defendant demurred.

The County Court, March Term, 1852,—PIERPOINT, J., presiding,—adjudged the replication insufficient, and that the writ abate.

Exceptions by plaintiffs.

W. W. Peck for plaintiffs.

1. The Comp. Stat. 257 § 9, 10, intends that the service on the trustee shall embrace a notice of the service to the principal debtor. This completed, the service on the trustee becomes a full service on the principal debtor. It could be completed only by the officer, who serves on the trustee, serving on the defendant a copy of the process, and of his doings under it. Thus he would have full notice of the pendency of the suit, and of the attachment, and further service would be superfluous.

2. The sections of the present statute, are a mere compilation, in this particular, of the previous acts upon the subject, and they provide expressly for such a service. See statutes from 1779 to 1885. *Corey v. Gale*, 13 Vt. 639. *Park et al. v. Trustees of Williams*, 14 Vt. 211. *Sawyer v. Howard & Tr.*, 22 Vt. 540.

3. The plea is bad. It sets up matter which is *dehors* the writ, for it cannot be told from anything in the record, out of the plea, that the officer was not authorized to serve process in Addison county. The plea should not therefore have commenced with a prayer of judgment. *Landon v. Roberts*, 20 Vt. 280. 1 Chit. Pl. 451. Goulds Pl. Chap. 5 § 142.

Phelps & Chittenden for defendant.

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1. The statute requires service to be made on the trustee in the same manner as a writ of summons, and where no property is attached, on the principal debtor in the *same manner*. The officer in this case had no authority to serve a writ of summons upon the principal debtor, and his service is therefore void. Comp. Stat. 257 § 10.

2. The service upon the trustee was complete when the copy was left with the clerk, and is not analogous to the case of attachment of personal chattels, which is incomplete until the copy of the process is left with the defendant by the officer making the attachment.

3. By the act of 1835, it was made the duty of the officer serving the process on the trustee, to leave a copy at the last place of abode of the debtor. The case of *Corey v. Gale*, 13 Vt., arising under this act, is not an authority in point.

The opinion of the court was delivered by

ISHAM, J. The writ in this case was served on the principal defendant, a resident of Ferrisburgh, in the county of Addison, by a deputy sheriff of the county of Washington. The statute directs, "that if the goods or estate of the principal defendant in his own hands and possession are attached, the writ shall be served on the principal defendant *in the same manner as an ordinary writ of attachment*, otherwise it shall be served as a writ of *summons*."

If this process had been an ordinary writ of attachment or summons, this officer could not have made the service, as his precinct did not extend out of the county of Washington. A deputy sheriff of Washington county cannot serve a process in the county of Addison. As the officer in this case had no authority to serve an ordinary writ of attachment or summons in the county of Addison, so he had no authority to serve this writ; for it is a matter of express provision that one process shall be served in the same manner, as the other.

A different mode of service was directed under the act of 1835. The form of the process under that act, was different from that now required. In the service of that process, the statute directed that the *same officer*, who served the writ on the trustees, should also leave a copy with the principal debtor. The writ under that

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statute was not required to be served as ordinary writs of attachment or summons; it was sufficient that the principal debtor had notice of the pendency of the suit against the trustees. It was under this act, that the case of *Corey v. Gale*, 18 Vt. 689, was decided. That case, therefore, can have no application to our present statute, where the writ in form issues against the principal debtor as an attachment or summons, and is to be served in the same manner, and where he is made the principal party on the record. The service of this writ is, in this particular, essentially defective.

The objection taken to the plea is overruled, on the authority of the case of *Gray v. Flowers*, 24 Vt. 533.

Judgment affirmed.

NATHAN B. HASWELL v. FARMERS AND MECHANICS' BANK.

Assumpsit for Interest.

The Vt. Central Railroad Co. took land in Burlington, under their charter, to which there were conflicting claims, and, upon petition to the chancellor, under the provisions of the statute of 1846, [Comp. Stat. 196,] were ordered to deposit in the Farmers and Mechanics' Bank the amount of land damages, as appraised by the commissioners, subject to the future order of the chancellor; and, upon petition subsequently preferred by Haswell, the plaintiff, who claimed to be entitled to the money so deposited, the chancellor, upon notice given to the company, in July, 1850, ordered the money so deposited to be paid to said Haswell, the plaintiff; from this order the said company appealed, and said appeal was duly entered upon the calendar of this court; and at the May term, 1851, it was held that said company could not appeal from the order of the chancellor, and the case was dismissed from the docket. The present suit was brought to recover interest, on the money so deposited, of the defendants; under the foregoing facts, it was held, that the defendants were mere depositaries and not chargeable with interest on the money, and that on general principles, this suit cannot be sustained.

It was also held, that though the order and decree of the chancellor, was not probably vacated by the appeal of said company, as it was improperly allowed, and was properly dismissed by the Supreme Court; still it affords a reasonable excuse for the defendants in not paying over the money, even if demanded, during the pendency of the appeal, as no decree had been made by the chancellor, which he himself treated as a final order in the case.

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ASSUMPSIT, for interest. Plea, general issue, and trial by the court.

On the trial, the plaintiff offered in evidence a petition, dated July 9th, 1850, in favor of the plaintiff, addressed to M. L. Bennett, chancellor, and an order made by said chancellor, on the 20th day of July, 1850, on the defendants, directing them to pay the plaintiff the sum of \$——, being the sum awarded by the commissioners of the Vt. Central Railroad Co., for certain land damages claimed by said plaintiff of the said company, and found by said chancellor on the hearing of said petition to belong to the plaintiff.

It was admitted by the parties, that said commissioners made such award, and that said company made petition to said chancellor, under the statute of 1846, [Comp. Stat. 196,] and that said chancellor made an order thereon, which was complied with by said company, and the money deposited with the defendants, on the 7th day of February, 1850. That on said 20th day of July, 1850, after the making said order to pay said money to the plaintiff, the said company prayed for an appeal, from said chancellor's decision, to the next term of the Supreme Court in this county, which said chancellor allowed, and said appeal was duly entered in said court, and was dismissed, as will appear by the report of the case on page 228 of the 23d volume of Vermont Reports.

It also appeared from other evidence, and the court found the following facts: That shortly after the 20th day of July, 1850, Mr. Smalley, the attorney of Mr. Haswell, called on Mr. Warner, the Cashier of said Bank, at the Bank, and told him Judge Bennett had made such an order, (to pay said money to Haswell,) but at the same time told him that the chancellor had allowed an appeal from such order, (though the chancellor said he thought it was not appealable,) and asked Mr. Warner if he would pay the money over. Warner said he would if the Railroad Company would order it paid. That Smalley soon after saw Warner, and Warner told him that said company refused to have it paid over.

That at the time Mr. Smalley called on Mr. Warner, as above stated, he did not present any order from the chancellor for the payment of the money; nor did it appear that such order was ever presented at the Bank, until the time when the principal was paid over; nor did it appear that the Bank ever objected to pay

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over the money, for the reason that such order was not presented.

That after the appeal was dismissed the plaintiff called upon Mr. Warner, as Cashier, and he paid over the amount of the award, but refused to pay any interest on the same, though interest was demanded by plaintiff.

That when said money was paid over, the plaintiff presented to said Bank the decretal order of said chancellor, and the dismissal of said appeal, signed by the clerk of the Supreme Court of this county, and that said plaintiff receipted the payment thereon; and that said decretal order was for the amount so ordered to be paid by said chancellor on said 20th day of July, 1850, and that said record and receipt thereon had been consumed by fire.

On this evidence, the defendants insisted that the plaintiff could not recover; but the County Court, September Term, 1852,—POLAND, J., presiding,—rendered judgment for the plaintiff to recover the interest due on the sum ordered to be paid, by said order of the 20th day of July, 1850, from said 20th day of July, up to the time of payment thereof by said defendants, and interest on said interest since.

Exceptions by defendants.

Phelps & Chittenden for defendants.

Interest is not recoverable except upon a contract express or implied to pay it, or as damages for the unreasonable detention of money which the party is bound to pay. *Evarts v. Nason's Estate*, 11 Vt. 122. *Abbott v. Wilmot*, 22 Vt. 437. *Wood v. Smith*, 23 Vt. 706. In the present case there was no contract whatever, and no privity between the bank and the plaintiff, much less any agreement to pay interest. The bank was a mere depository of the money under a statute provision.

It was the duty of the Bank to retain the money until appropriated by order of the chancellor. The appeal allowed by the chancellor vacated, or at least suspended the order until the appeal was disposed of. And though it was ultimately held that the order was not subject to an appeal, the allowance of it was sufficient to protect the Bank in retaining the money until the proceedings were terminated.

The Bank acted in good faith. Had they paid before, it would have been at their own risk. It would be unreasonable to require

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them to overrule the action of the chancellor upon a question entirely new.

D. A. Smalley for plaintiff.

It is a clear principle of law in our state, that interest is due for the detention of money, which the party ought to pay. *Newell v. Ezer. of Smith*, 11 Vt. 219. *Abbott v. Wilmot*, 22 Vt. 437. The general principle has long been settled in this country, that if a debt ought to have been paid at a particular time, and is not paid through the default of the debtor, interest is due on the same from that time. 1 Am. Lead. Cases 847. *Sellick et al. v. French*, 1 Con. 32.

And the defendants were liable to pay interest on interest, from the time they paid the principal to the time judgment was rendered in this suit, by way of damages, as the interest was due, as well as the principal, at the time they paid the principal. *Cutler v. Lyman et al.*, 16 Vt. 44.

Haswell presented the chancellor's order of July 20th, 1850, and the dismissal of the appeal, which was all that he could present. The decretal order was not for interest, as no interest was due when the order was made. But the case shows that the plaintiff demanded interest, and the defendants refused to pay it, and there has been no delay in claiming it, as the commencement of this suit shows. We think the case in the 22 Vt. 437, is an authority for us.

The opinion of the court was delivered by

ISHAM, J. We think the defendants are not chargeable for the interest, for which this suit is brought. A claim for interest must rest on one of two grounds; either upon a contract express or implied, or as damages for some wrongful act or default in the payment of that which is due another. The liability to pay interest as damages, rests upon a principle distinct from the liability to pay interest as a compensation for the use of money. 1 Am. Lead. Cases 496, (note.)

There is no pretence in this case, that the defendants are liable for this interest on any contract, nor from the consideration that they have derived any benefit from the use of the money.

The principal, on which interest is demanded, arose from an as-

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assessment of Railroad Commissioners, and was deposited in the Bank under the directions, and subject to the order of the Chancellor. Comp. Stat. 196 § 25. When money is thus deposited, it is placed in the custody of the law, and cannot be recovered by, or paid to any one, until the order of the chancellor to that effect is made. The defendants were mere depositaries of the money without reward, and are no more chargeable with interest on that sum, than is a trustee, by the mere fact of having the money of the *cestui que trust* in his hands; or a mere receiver, bailee, or stakeholder, in whose hands money remains ready to be paid over. In all these cases, they are not chargeable with interest unless a benefit has been derived from the use of the money, or they, in some way, are placed in fault. "The question turns on the fault of the party." *Dodge v. Perkins*, 9 Pick. 869, 886. 1 Am. Lead. Cases, 499, 510. *Hooper v. Brinton*, 8 Watts 73.

It appears from the case, that an order for the payment of this money to the plaintiff was made by the chancellor on the 20th of July, 1850. If no appeal had been allowed, and a legal demand had been made, the defendants would have been chargeable with interest, on their neglect or refusal to pay the money as directed by the chancellor. The Vt. Central Railroad Co. however, who were one of the parties to that proceeding, requested and were allowed by the chancellor an appeal from that order and decree, to the next term of the Supreme Court, and in pursuance of that appeal, the case was duly entered upon the calendar of that court. *Haswell v. Vt. Central Railroad Co.*, 23 Vt. 228.

The order and decree of the chancellor was not probably vacated by that appeal, as it was improperly allowed, and was properly dismissed by the Supreme Court; yet during the pendency of that appeal and while the parties to that proceeding were contesting their rights, and the propriety of that order of the chancellor, it should be considered and treated as a suspension of that order until the appeal was finally disposed of. It will afford a reasonable excuse for the defendants in not paying over the money, as no decree had been made by the chancellor, which he himself treated as a final order in the case. It fully appears, that the defendants were at all times ready to pay the money to any one, when they could do it with safety to themselves. It so appears, at the time when they were called upon by Mr. Smalley, and from the

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fact that the money was paid immediately after the appeal was ended and dismissed. It would be unreasonable to require these defendants to assume the risk and responsibility of paying over this money, while the parties were contesting the propriety of that decree; and since the chancellor himself has allowed and permitted the appeal to be taken and prosecuted. Under such circumstances, they cannot be chargeable with interest on that money until after such an order for its payment has been made, as the chancellor shall treat as his final order in the case, and which will afford the Bank such a voucher for its payment, as will free them from all risk and responsibility in making it. Without deciding other objections which have been made, we think, on general principles, that this suit cannot be sustained.

The judgment of the County Court is reversed, and the case remanded.

ROBERT BEACH 2D v. HENRY BOYNTON.

Book Account. Jurisdiction of a Justice of the Peace.

In actions on Book Account, the plaintiff's book, and the *debit* side of that book, afford the *only rule* by which the jurisdiction of the justice is to be determined.

The jurisdiction of a justice in the action on Book Account, is not affected by the defendant's book, or by any entries therein, which he may make to the credit of the plaintiff.

BOOK ACCOUNT. The action was originally brought before a justice of the peace, and came to the county court by appeal. The case was sent to an auditor, and from his report returned to the county court, March term, 1858; it appeared that the *debit* side of the plaintiff's book was under one hundred dollars. But that defendant's account exceeded one hundred dollars, and his credits to the plaintiff also exceeded that sum. It also appeared, that the defendant's account included a cash deal between the parties of sums of money lent and paid; but this deal the plaintiff had

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never kept, and the sums credited to the plaintiff in this cash account, had never been charged by the plaintiff on his book against the defendant, he leaving the cash deal to be kept entirely by the defendant. The auditor found that the account of the cash deal presented by defendant was correct, and that a balance on said account of \$29.83 was due defendant. If the cash deal be added to plaintiff's account the *debit* side of his book will exceed \$100. This cash deal had never been settled by the parties. The auditor found a balance due the plaintiff, taking the cash deal into the settlement.

The defendant upon the coming in of the auditor's report, moved to dismiss the cause for want of jurisdiction.

The County Court,—PECK, J., presiding,—overruled the motion to dismiss, and rendered judgment on the report for the plaintiff. Exceptions by defendant.

Geo. F. Edmunds for defendant.

The justice had no jurisdiction. The borrowed and lent account was just as much a matter of accounting, and just as much to be adjusted as the other accounts. It was the balance in respect to all the accounts and that only, which the plaintiff was entitled to sue for and recover. He could no more sue upon one part of the account than the other. The whole of the plaintiff's matters of account were to be adjusted, with the whole of the defendant's, and upon the facts reported, it will hardly be contended that all of it was not a proper subject of accounting.

The rule is, if the county court has jurisdiction the justice has not; and it would be confounding all distinction between the respective jurisdictions, to leave the choice to a party, which tribunal he would select.

Phelps & Chittenden for plaintiff.

The *debit* side of the plaintiff's book determines the jurisdiction. That was less than one hundred dollars. *Hatch ex parte*, 2 Aik. 28. *Stone v. Winslow*, 7 Vt. 338. *Temple v. Bradley*, 14 Vt. 254. *Gage v. Barnes*, 14 Vt. 195. *Nichols v. Packard*, 16 Vt. 91. The case does not show that this cash deal was presented before the justice, and if it was not, the question of jurisdiction cannot be raised. *Stone v. Winslow* above cited.

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The opinion of the court was delivered by

ISHAM, J. The judgment of the county court in this case must be affirmed. The question in the case arises on a motion to dismiss for want of jurisdiction by the justice, before whom the suit was originally commenced.

The Comp. Stat. 233 § 20, 21, gives exclusive jurisdiction to justices of the peace, of all actions of a civil nature where the debt or matter in demand does not exceed one hundred dollars; and in actions on book account the statute provides, *that the matter in demand shall be the debtor side of the plaintiff's book*. The plaintiff's book, and the *debit* side of that book, affords the *only rule* by which the jurisdiction of the justice is to be determined. The jurisdiction of the justice is not affected by the defendant's book, nor by any entries therein, which he may make to the credit of the plaintiff. The statute makes no such reference; but it is expressly confined to the *debit* side of the plaintiff's book.

The adoption of the rule, which is contended for by the defendant, that the credit on the defendant's book will affect the jurisdiction of the justice, would manifestly introduce a rule, defining and limiting the jurisdiction of that court, different from that which is given by statute.

The case of *Stone v. Winslow*, 7 Vt. 388, is decisive on this subject. The court in that case remarked, "that it was improper for the defendant to show that the plaintiff has not charged as 'high a price as was agreed, or has not charged all the articles sold, or any other matter out of the book, to enhance the debt or alter the jurisdiction.'" The doctrine of this case was afterwards approved in *Nichols v. Packard*, 16 Vt. 91, and it is regarded as the only rule that can properly be adopted.

Judgment affirmed.

Clark v. Edgell.

THOMAS CLARK v. LEVI A. EDGELL.

Book Account. Jurisdiction.

Where the plaintiff's account was over one hundred dollars, but he and the defendant had looked over the account, at the end of every week, and the balance was carried on to the account of the next week, and so from week to week, until the parties had a final settlement or looking over, and found the balance due plaintiff to be \$97,00; the plaintiff called upon the defendant to pay this sum; he neglecting to pay it, the plaintiff brought the present suit, insisting that the whole account between himself and defendant was an open book account; upon this state of facts it was held, that the settlement was not a merger of all the previous dealings between the parties, and that the county court had jurisdiction of the suit.

It was also held, that though assumpsit may lie upon an implied promise to pay the balance found due; yet that does not preclude the general action of assumpsit for goods sold and delivered, and the settlement might be used as evidence to regulate the sum to be recovered.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed. It appeared from the auditor's report, that the plaintiff was a shoemaker by trade, and that he worked for the defendant by the piece or pair, and while he so worked, as a general practice, he and the defendant were in the habit of looking over their accounts at the end of each week, and finding the balance; and such balance, whether in favor of the plaintiff or defendant, was carried on to the account of the next week; and that this was done from week to week, until the parties had a final settlement, and the balance due the plaintiff was found by the parties to be \$97,00. That plaintiff called upon the defendant for payment of the same; but defendant neglecting to pay, the plaintiff brought the present suit. The account was kept on the book of the plaintiff, and the defendant made the balances, as above stated, in the presence of the plaintiff, but there was no settlement signed by the parties, as such, upon the book. The plaintiff insisted that this account between himself and defendant was an open book account, and so presented his account before the auditor; and the account, so presented, exceeded one hundred dollars.

After the filing of the auditor's report, the defendant moved to dismiss the cause for want of jurisdiction; claiming—1. That the *debit* side of plaintiff's book at the commencement of the action, did not exceed \$100. 2. That the amount due to the plaintiff

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from the defendant, at the commencement of this suit, could not be recovered in an action on book account.

The county court, March Term, 1853,—PECK, J., presiding,—overruled the motion to dismiss, and rendered judgment for plaintiff, on the report.

Exceptions by defendant.

Wires & Peck for defendant.

Underwood & Hard for plaintiff.

The opinion of the court was delivered by

BENNETT, J. The only question in this case is one of jurisdiction. It is said that the settlement was a merger of all previous dealings; and in legal effect blotted them out. But we think it had no such effect. Though assumpsit may lie upon an implied promise to pay the balance found due; yet that does not preclude the general action of assumpsit for goods sold and delivered, and the settlement might be used as evidence to regulate the sum to be recovered.

Under the decisions in this state, it is evident the county court had original jurisdiction. The judgment below is affirmed with costs.

C. L. HILL v. DANIEL HOVEY AND OTHERS.

Book Account. Contract. Condition Precedent.

Where the plaintiff had contracted to lay a given quantity of floor in a certain building, and by the terms of the contract, the defendants were to furnish the boards, well seasoned, and neglected to furnish them as they were wanted by the plaintiff, and the plaintiff abandoned the job, it was held that the plaintiff was entitled to recover for what he had done.

And where the defendants, by the terms of their contract, assume to see the boards furnished as they should be wanted by plaintiff to lay the floor, it is a condition precedent to the performance of the contract, on the part of the plaintiff, to lay the floor.

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The plaintiff was under no obligation to make a special demand on the defendants for the boards, as it was equally within the means of the knowledge of the defendants, as of the plaintiff, when they would be wanted to enable the work to progress.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported substantially the following facts :

That in November, 1852, the plaintiff contracted with the defendants, to lay the floors in two sections of the Mechanics' Shop in Burlington, at the price of eighty and three-fourth cents per one hundred superficial feet; the floors to be double, and laid with lumber, as it came from the mill; the under flooring to be of green plank, and the upper of seasoned stuff.

That this lumber was to be furnished to plaintiff, at the middle door of said section, on the east side of said shop, by the defendants through the Mechanics' Shop Company, under whom the defendants had a contract including the flooring in question; but defendants were not to be responsible for delays in the furnishing of the lumber by said company. But that it was the mutual expectation of the parties that the lumber would be furnished so as to have the job completed by the first day of February, 1853. That no time was specified when plaintiff should complete his job, but it was mutually expected that it would be completed by said first day of February. That plaintiff soon after making said contract went to work under it, and worked until the latter part of January, 1853, when, no lumber being furnished him, with which to proceed, he abandoned the job.

The auditor found that plaintiff had performed labor, under the contract, to the amount of \$137,49, at the contract price, and that it was, in fact, worth that sum. That the damage to the defendants was \$5 by plaintiff's abandoning the job, and that the defendants had paid plaintiff \$100, and the auditor found for plaintiff to recover the balance \$32,49 and interest from the first day of February, 1853.

The auditor also found, that at the time plaintiff so abandoned the job, there was no seasoned stuff for laying the upper flooring, nor was any got ready by said company, in season to have completed the job by said first day of February, 1853.

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The defendants insisted that plaintiff was not entitled to recover. But the county court, September Term, 1853, rendered judgment on the report of the auditor, for the plaintiff.

Exceptions by defendants.

The briefs of the counsel were not sent to the reporter, with the papers in the case.

W. W. Peck and Underwood & Hard for defendants.

_____ for plaintiff.

The opinion of the court was delivered by

BENNETT, J. The defendants had contracted with the plaintiff to lay a given amount of floor, in the Mechanics' Shop, in the town of Burlington, at a given price, and the defendants were to find the floor boards which were to be well seasoned; and the report shows, that they neglected to supply them when wanted, and that plaintiff left the job unfinished on that account; and now the defendants deny his right to recover any compensation for what he has done. But we think he is clearly entitled to recover. The case is with-in the decisions which we have frequently made, allowing a party to recover for labor done by him under a special contract, though he had left the job unfinished. The defendants, themselves, were the occasion of the plaintiff's leaving the job before he had performed the contract. Besides the work was done upon a permanent fixture, and of which the plaintiff could have no benefit, and which operated for the benefit of the defendants, as doubtless the plaintiff was a sub-contractor under them.

The fact reported, that the defendants were not to be liable for their neglect, in not furnishing stock can have no effect in this action. All we are to understand by that is, that the plaintiff was not to have an action against the defendants for such neglect; and it should not defeat the plaintiff of his right to abandon the job, for a breach of contract on the part of the defendants. We do not see that there is any ground for the claim, that the plaintiff should have given notice to the defendants before he quit the job. It was the duty of the defendants to furnish the boards as they should be wanted for use. No special demand was necessary to be made for them; and it was equally within the means of the knowledge of

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the defendants, as of the plaintiff, when boards would be wanted to enable the work to progress; and by the terms of the contract the defendants had assumed to see them furnished, and this was a condition precedent to the performance on the part of the plaintiff.

The judgment of the court below is affirmed with costs.

A. P. BARBER v. BRITTON & HALL.

Book Account. Liability of the Principal for the acts of his agent.

If an injury is to result to one man from the omissions or neglect of an agent of another, the principal must be held liable.

And where the defendants sent their agent to employ the plaintiff, who was a physician, to visit a boy, who had been injured while in their service, and told the agent to tell plaintiff that they would pay him for his first visit, and the agent neglected so to do, and employed the plaintiff generally to attend the boy, so long as he might need medical aid; and the plaintiff attended upon the boy, on the credit of the defendants, until the boy recovered—*Held* under these facts, that defendants were liable to the plaintiff for his services in attending upon the boy.

This court will not reverse a judgment of the county court, unless enough appears affirmatively to show that there was error.

BOOK ACCOUNT. The suit originally was brought before a justice of the peace, and came to the county court by appeal, and an auditor was appointed, who reported in substance:

That defendants were partners in the construction of a portion of the Vermont Central Railroad in Burlington, that they had in their employ, on their job, a boy, who had been to work for them for wages; and that on or about the second day of May, 1850, while in their service, the boy received a severe injury, by being crushed between two dirt cars, in the use of the defendants on their work.

That defendants were absent at the time of the accident, and the boy was taken to a house near by and a physician sent for, and the defendants becoming dissatisfied with his treatment of the boy, they, after having been to see the boy, conversed upon the

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subject of the boy's injury, and came to the conclusion that something further ought to be done for him. They then examined their books and found that they owed the boy some five or six dollars; that they then said to one Sweat, who was in their employ as foreman and had charge of the men on their work, that they wanted he should go and tell Dr. Barber, the plaintiff, to come and see the boy and see if the physician who had been attending upon the boy, was treating him properly. That said Sweat started, and as he was passing out of the door, Britton said to him, tell Dr. Barber to come up and see the boy, and that they (Britton and Hall,) would pay him for that visit, and Hall who was present concurred in and approved it.

That said Sweat then went to the plaintiff's office, and the plaintiff being out, he told the plaintiff's students in the office, that Britton and Hall told him to tell Dr. Barber to go and see the boy that had got hurt in their employ, and attend upon him carefully, and see him through it, and they, (Britton and Hall,) would pay the bill, that he was a likely boy, and they thought much of him; that said Sweat requested plaintiff's students to communicate this message to the plaintiff, which they did, about an hour after.

That the plaintiff upon the faith of this, and relying solely upon the credit of the defendants, immediately visited the boy, and from that time took charge of him, and was the only surgeon who attended him until he recovered; that all the plaintiff's account accrued upon the faith of this employment, the plaintiff supposing that defendants were liable to him, and that they expected to pay the whole account.

That the defendants were in the habit of visiting the boy from time to time, and knew that the plaintiff was attending upon and taking charge of him, during the whole period of time while the account was accruing.

The county court, September Term, 1852,—POLAND, J., presiding,— rendered judgment on the report for the plaintiff.

Exceptions by the defendants.

W. W. Peck for defendants.

I. Defendants are not liable for more than the visit embraced in the first charge.

The agent Sweat, exceeded his actual authority, and was not

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clothed with an apparent authority greater than his actual. The third person who deals with the agent, is bound to inquire into the extent of his power. Hence, unless he has been represented by the principal to possess more than has been conferred, the third person is bound to learn his real power. Story on Agency § 126 note 2, § 127, 129, 131, 132, 133. *Fenn v. Harrison*, 3 Term R. 757. S. C. 4 Term R. 177. *East Ind. Ins. Co. v. Hensley*, 1 Esp. 111. *Snow v. Perry*, 9 Pick. 589. *Laddell v. Baker*, 1 Met. 201. *Baity v. Carswell*, 2 Johns. 48.

II. That defendants knew that plaintiff was attending the patient after the first visit, is not a fact, from which an assent to his doing so upon their responsibility can be inferred, as matter of law against them.

Underwood & Hard for plaintiff.

I. This court will not reverse the judgment of the county court unless for error apparent upon the record.

If therefore the facts found and reported, by the auditor, are sufficient in law to support the decision of the county court, or if from the facts reported the court was authorized to infer such an understanding of the parties as would render the defendants liable—the decision below should not be disturbed. *Clark v. Whipple*, 12 Vt. 488. *Clark et al v. Waterman*, 7 Vt. 76. *Abbott v. Camp*, 28 Vt. 651.

II. The rule in relation to the agent is, that where an agent in transacting the business of his principal, is guilty of a misfeasance, nonfeasance or negligence, by which a third person suffers—the principal is responsible. So if a message is sent, and the messenger deliver it in such a manner, that the person to whom it is delivered is justified in doing an act on the credit of the principal, the principal is responsible. Upon the rule that when one of two innocent persons must suffer from the act of an agent, he who employed the agent must bear the burden. *Goodman v. Eastman*, 4 N. H. 455. 12 U. S. Digest 493. *Bloomer v. Denman*, 12 Ill. 240. *Johnson v. Barber*, 5 Gilman 425. *Phil. & Read. R. R. Co. v. Derby*, 14 Howard 468.

The opinion of the court was delivered by

BENNETT, J. The defendants sent their own agent for the

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plaintiff, and clothed him with authority to employ plaintiff to visit the boy, and though the agent was told to inform the plaintiff that the defendants would pay him for the first visit; yet this the agent for some cause neglected to do, and employed the plaintiff generally to attend the boy, so long as he might need medical aid.

The law is well settled, that if an injury is to result to one man from the omissions or neglect of an agent of another, the principal must be held liable. In this cause the defendants, through the neglect of their agent caused the services to be rendered upon their credit; and the case is within the above principle.

There is another ground upon which the judgment below should be affirmed.

This court will not reverse a judgment of the county court, unless enough appears affirmatively to show that there was error. The evidence tended to prove a ratification of the acts of the agent by the principals. The county court may have decided this case by inferring a ratification from the facts reported by the auditor; and if the county court, instead of recommitting the report for a more explicit finding of facts, draw their own inferences arising from the facts, specifically found by the report, their decision is final. *Birchard et al v. Palmer*, 18 Vt. 303, is to that effect.

If necessary to sustain the judgment below, this court will presume the county court drew such inference, if the contrary does not appear.

The judgment of the County Court is affirmed.

GEORGE J. GOODRICH v. SCHOOL DISTRICT NO. 1, IN
FAIRFAX.

Book Account. School Teachers. Certificate of Qualifications from the Superintendent of Schools, is a pre-requisite to a right of action for services, &c. Prudential Committee.

The statute requires every teacher to obtain a certificate of his qualifications before he opens his school; and the obtaining of such certificate is a pre-requisite to a right of action for his services as a teacher.

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And the facts, that the teacher was a minor, and that the superintendant was sick, and deceased, and no superintendent was appointed to fill the vacancy, till after his school commenced, cannot supersede the statute.

And the prudential committee have no power to waive the requirements of the statute, nor can the prudential committee bind the district, by a contract with the teacher, that he may teach the school without procuring a certificate of his qualifications.

BOOK ACCOUNT. The action was originally commenced before a justice of the peace, and came to the county court by appeal. The case was sent to an auditor, who reported substantially the following facts :

That the plaintiff contracted with the prudential committee, of school District, No. 1 in Fairfax, to teach the school in said district, for the term of three months in the winter of 1851, and that the plaintiff, soon after said contract, and on the 25th day of October, 1851, with the intention of submitting himself to an examination, as to his qualifications, made inquiry of the town clerk in said Fairfax, for the superintendent of common schools in said town; and upon such inquiry learned that the superintendent had removed from said Fairfax. That afterwards, and on the 29th day of November, 1851, having learned that a Mr. Scott had been appointed superintendent, the plaintiff repaired to the residence of said Scott, and there found said Scott so sick as not to be able to examine plaintiff.

That before the first day of December, 1851, the plaintiff informed the prudential committee of said district of his application to said Scott for examination, and of the inability of Mr. Scott to examine him, and that he had not obtained any certificate of his qualifications to teach a common school, whereupon the said prudential committee directed the plaintiff to go on, and begin his school, on the first day of December, as he had agreed, and that not having obtained a certificate of his qualifications, should make no difference.

That plaintiff, on said first day of December, 1851, pursuant to his contract, commenced teaching school in said district, and continued to teach said school for the said term of three months, as he agreed. That after he had commenced his school, and on or about the first day of January, 1852, plaintiff submitted himself for examination to a Mr. Dunn, who then was and had been superinten-

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dent of common schools in said town, from the 4th day of December, 1851, he having been appointed after the decease of the said Scott. That Mr. Dunn examined plaintiff, as to his qualifications to teach a common school, and did not find him qualified, and did not grant or give plaintiff any certificate of qualification.

That on or about the 15th day of January, 1852, the plaintiff applied to the prudential committee to be released from his said contract, having failed to obtain his certificate, and some of the inhabitants having become dissatisfied with the school; but said committee refused to release plaintiff from his contract, and told him if he should then discontinue the school, the district would not pay him for the time he had taught; and that they were satisfied with his school, and if he continued on, and kept his time out, the district would pay him all his wages, and the plaintiff continued to teach said school through said term of three months.

The county court, March Term, 1853,—PICK, J., presiding,—rendered judgment on the report for the plaintiff.

Exceptions by defendants.

Underwood & Hard for defendants.

The plaintiff not having procured a certificate of qualification previous to the performance of the services charged is not entitled to recover. Comp. Stat. 148 § 8, 12. *Baker v. School District No. 1 in Bakersfield*, 12 Vt. 192.

The committee have no authority to waive this provision of law, so as to bind the district.

——— *Hodges and Geo. F. Edmunds* for plaintiff.

The case shows that from the time of the making of the contract to the commencement of the school, the office of superintendent of schools in Fairfax was vacant—there was no officer who could give the plaintiff a certificate.

It is to be observed that the contract was not void in its inception. The language of the statute is that the contract "shall be null and void if the said teacher shall fail to obtain a certificate of qualification, of the superintendent of the town in which such district shall be situate, before the commencement of the school, &c." The contract was therefore clearly valid when it was made.

We insist, that a fair construction of the terms of the statute will

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excuse the want of a certificate in this case. The words "if the teacher shall fail, &c." clearly imply the existence of an officer invested with powers to examine, and an examination by him, and refusal to certify; or at least a voluntary failure on the part of the teacher. Now, in no just sense can the teacher be said to fail to obtain a certificate from an officer, when there is no such officer competent to grant or deny one.

The consequences of a different construction would put it in the power of a town to stop all schools within its borders.

The opinion of the court was delivered by

BENNETT, J. The statute relating to common schools, makes it the duty of the several towns in the state, to appoint annually, one or more superintendents of common schools; and they are made the judges of the qualifications of those who shall wish to become teachers; and every teacher is required to obtain of the town superintendent a certificate of his qualifications before he opens his school; and the 12th section of the act declares all contracts for teaching *null and void*, if the teacher shall fail to obtain a certificate of qualifications of the town superintendent, before the commencement of his school.

The obtaining a certificate is a *pre-requisite* to a right of action; and this seems to be admitted, as a general rule; but it is claimed, that from the facts in this case, the rule, or in other words the statute, should be relaxed; but we think not. It is of no importance that the plaintiff was a minor; and the fact that Mr. Scott, the superintendent, was sick, and unable to examine him, and that after his death no superintendent was appointed in his place, till after the plaintiff commenced his school, can not supersede the statute; and the prudential committee had no power to waive its requirements.

There is no equity in the plaintiff's case; a superintendent was appointed four days after the plaintiff commenced his school; but he neglected to apply for an examination, and when he was eventually examined, he was found not qualified. To hold that the plaintiff can recover in this case would be not only to dispense with the statute, but also with the necessary qualifications of a teacher in point of fact; and this would be to repeal the statute in its very spirit. The cause of education is peculiarly in the hands of the

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Legislature, and the object of the statute was to guard against the employment of incompetent teachers.

Whether the plaintiff could have a remedy against the committee, for inducing him to go on with his school without an examination, is a point not before us. Certainly they could not bind the school district by waiving the express provisions of the statute.

The judgment of the County Court is reversed, and judgment on the report for the defendants.

LYMAN, CONVERSE AND POMEROY v. JAMES ORR, AND IRA D. BIXBY & HENRY W. CATLIN, TRUSTEES.

Trustee Process. The liability of the Trustee to pay interest considered.

The judgment creditor cannot recover interest of the trustee for the funds in his hands, if when his suit was commenced, and when the disclosure was filed, the trustee was not chargeable with interest in behalf of the principal debtor.

And if the principal debtor, when the suit was commenced, could not claim interest of the trustee, neither could he, if the trustee process should be dissolved, claim interest up to that time, if there had been no wrongful detention of the money on the part of the trustee; and in this respect the attaching creditor acquies no rights, that the principal debtor would not have.

The trustee process locks up the funds in the hands of the trustee, and after the service of the writ until the termination of the suit, the funds are in the custody of the law, and it is not necessary for the trustee to protect himself to deposit the funds with the clerk, but he is himself the stake-holder of the funds, for the one or the other, as their rights may be determined.

TRUSTEE PROCESS. The only question in this case, arose upon the disclosure of Ira D. Bixby, who disclosed in substance, that on the 16th day of September, 1850, he purchased of James Orr, the principal defendant, a house and lot in Burlington, for which he agreed to pay said Orr the sum of \$2900.

That at the time of the trade, and as part of said contract, he assumed and paid debts of said Orr to the amount of \$2555.18, consisting in the most part of incumbrances on said house and lot;

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and that of said \$2900, so agreed to be paid, by said supposed trustee, for said house and lot, the sum of \$344,87 remains unpaid, and is still due to said Orr. That except as above stated, this supposed trustee had not in his hands or possession at the time of the service of this writ on him, nor has he since had, nor has he now any money, goods, chattels, rights or credits of the said Orr.

And the said Bixby further disclosed, that before the service of this writ on him, to wit on the 17th day of September, 1850, he was summoned as trustee of the said James Orr, in and by a writ in favor of one Carlos Baxter of said Burlington, dated the 16th day of September, last aforesaid, signed by D. B. Buckley, Clerk, demanding in damages \$1000, and returnable to Chittenden county court, March term, 1851, and that said writ has been duly returned and is now pending in said court.

And thereupon submits himself &c.

At the September term, 1853, of the county court, the plaintiffs claimed that said Bixby was chargeable for said \$344,87 and interest thereon from the March term of said court, 1851, when said disclosure was filed, to the above September term, 1853.

The County Court,—PIERPOINT, J., presiding,—adjudged the trustee chargeable for said sum of \$344,87 and the interest thereon as claimed by the plaintiffs.

To this decision adjudging the trustee chargeable with said interest, the trustee excepted.

W. W. Peck for trustee.

The trustee was not chargeable with interest. A party is liable for interest only in one of three ways; by way of contract, when he stipulates to pay interest,—by way of damages—and by way of accounting for profits realized from trust property. This trustee is not within the rule.

Again, To subject him to interest would be a perversion of the trustee process. Its purpose is to give the creditor security without prejudice to the trustee, by substituting him in the place of the debtor to recover what otherwise would be recovered by the latter.

The effect of the judgment would be to subject the trustee to an additional liability, without the power of avoiding it. *Foxcraft v. Knight*, 2 Dallas 132. *House v. Allen*, 2 Dallas 102. *Fitzgerald v. Caldwell*, 2 Dallas 215. *Sickman v. Lapsley*, 13 Serg.

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& Rawle 224. *Prescott v. Parker*, 4 Mass. 170. *Adams et al. v. Cordis et al.*, 8 Pick. 260. *Oriental Bank v. Tremont Ins. Co.*, 4 Met. 1. *Williams v. Consequa*, Peters C. C. Rep. cited in 4 Met. 6 Johns. 445.

Phelps & Chittenden for plaintiffs.

The debt due from Bixby to the principal debtor, set out in the disclosure, was one which bore interest by its terms.

It is therefore subject to interest in favor of the creditor, who stands in the same relation as the principal debtor towards the trustee. *Adams et al. v. Cordis et al.*, 8 Pick. 260. *Seymour v. Cooper & Trustees*, 25 Vt. 141.

The rule is no hardship to the trustee, and is only simple justice to the creditor.

If the trustee had not continued in the use of the money, or had been deprived of the interest by the process, or had even made a deposit of the funds, or had taken any step to protect himself from liability for the interest, a different question would have been presented. He does not even object to the payment of interest in his disclosure.

The opinion of the court was delivered by

BENNETT, J. The only question in the case, is as to the amount for which the trustee, Bixby, should be held to be chargeable. Bixby bought the place of Orr, at \$2900, and after deducting the incumbrances, there was left in the hands of this trustee \$344,87, for which sum it is conceded he should be adjudged trustee; and it is also claimed that he should be charged with interest on that sum; but a majority of the court think otherwise.

The sale to Bixby was made the 16th day of September, 1850, and the next day Carlos Baxter commenced his trustee suit, demanding in damages one thousand dollars. That suit was pending when this was commenced, and at the time of filing the disclosure. When Baxter commenced his suit, the trustee was not in behalf of the principal debtor, chargeable with interest. There had been no unreasonable detention of the balance due the principal debtor. He would naturally require some little time to ascertain accurately the amount of the incumbrances.

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When Baxter's writ was served, there is no ground to suppose that by implication a credit had been given to Bixby for the balance to be paid Orr, or an implied promise to pay interest upon it. Neither had there been at that time, any wrongful detention of the money, by means of which interest might commence running. The effect of Baxter's suit was to lock up the funds in the hands of the trustee; and this was their condition when the present suit was commenced, and since that time the funds have been in the custody of the law. If this trustee process had been dissolved, there is no ground upon which the principal debtor could claim interest up to that time; and the attaching creditor must stand in his shoes. If this demand had been on interest at the time the first trustee process was served, the case might have merited a different consideration. But as it was not, I apprehend there is no sound ground, upon which we can say the interest shall have run since the demand has been locked up. It is said in argument, that a doctrine of this kind opens a door for *collusion* between the trustee and the plaintiff to get the funds locked up to save the interest. It is sufficient to say, that when such a case arises, it will be time enough then to decide it. Quite a different result in such a case might follow.

Neither is it necessary to say what our decision would have been, if it had appeared that the trustee had received interest on this fund, pending the trustee suit. But this we are not to presume. It may be said, that if the trustee intended to exculpate himself from the payment of interest, he should have deposited the money with the clerk of the court. But why so? There is no law which makes that a duty. The trustee is himself the stakeholder of the funds, for the one or the other, as their rights may be determined; and to deposit the money with the clerk would be the veriest gratuity.

The cases cited by the counsel from the 4th Mass., and the 4th Metcalf, are full authorities for this decision; and they are not at variance with the case in the 8th of Pick.

The result then must be an affirmance of the judgment against the principal debtor; and as to the trustee, Bixby, the judgment of the court below is reversed with costs, and judgment that he is chargeable for the principal only, that is, for \$344,87.

ISHAM, J., dissenting.

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CALEB F. LINSLEY v. NOBLE LOVELY.

Bills of Sale. Evidence. Custom or Usage. Principal and Agent. Charge to the Jury.

If a bill of sale expresses the contract of the parties, it can not be controlled by parol evidence any more than any other written contract. But where the bills of sale, as in the present case, simply state, that on a given day, the defendant bought of the plaintiff certain articles, at given prices, with a memorandum on the margin "six per cent off for cash," it was *held* that it did not import a contract, and that it was simply *declaratory* of a fact, and the defendant can show the true contract of the parties, consistent with those written declarations by parol evidence.

And the words endorsed on the bills "six per cent off for cash," being equivocal, it is competent to prove to the jury, how they are understood by a *custom* or *usage* among men engaged in the same class of trade with the plaintiff.

If a witness, who is interested, as a member of a certain firm, in the event of the suit, has executed a release of all claims, which he had as an individual or a partner in the firm, the release is sufficient, and he is a competent witness.

And where a witness, who was assignee of the defendant, had sold and conveyed by covenants of warranty, a part of the real estate of the defendant, which had been attached by plaintiff, and witness held in his own hands ample indemnity, in case plaintiff recovers, out of which the judgment may be satisfied, his interest is too remote to affect his competency.

And if a party call a witness, and have him sworn in chief, and examined, though it be upon a question to the court touching the interest of another witness, still this will exclude the party calling him from objecting to the opposite party's examining him, upon the merits of the cause to the jury, for it is a waiver of the interest of the witness, by the party so calling.

It is competent for a witness, who as agent negotiated a trade for the principal, to testify how he understood the contract, at the time of the trade, as his understanding is the understanding of the principal; but it is not competent for him to testify how the other party, or the agent of the other party understood the contract, as this is the opinion of the witness, and a fact to be found by the jury.

The office of a *custom* or *usage* is strictly one of *exposition*, and is allowable to be given in evidence only as one means of arriving at the *intention* of the parties, and can never be received to thwart it, when it is clearly and fully expressed.

The *custom* or *usage* set up in the present case, was, that there were a class of mercantile houses in the city of New York, in the same general line of trade with the plaintiff, that were generally known as "six months houses;" that by their general and uniform course of business, a bill made out in the manner of plain-

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tiff's bill to defendant, it would be understood to be a sale on six months' credit, without any express stipulation to that effect between the parties; that this usage may discharge the office of *exposition*; *it was held*, it must be found to be the *general usage* of the whole of that class of houses, in the city of New York, to which plaintiff belonged, and so well *established* and *uniformly acquiesced* in, and for such a length of time, that the jury might be fairly justified in inferring that it was known to the contracting parties, and that it entered into their minds and made, by *implication*, a part of their contract.

And if such a *custom* or *usage* is not fairly proved, it should be laid wholly out of the case; so too, if the offer is not to prove such a *custom* or *usage*, the evidence should be excluded.

If a clerk or agent in a store exceeds his general powers, by giving a credit to a customer, and the customer has no notice or knowledge of the fact, at the time, but acts in good faith, the principal will be bound by the act of his agent or clerk.

ASSUMPSIT for goods sold and delivered. Plea, the general issue, and trial by jury.

The plaintiff claimed to recover of the defendant the amount of two bills of goods, sold by him to the defendant on the second and fourth day of May, 1848, and the other on the seventh day of June following, both bills amounting to over eight hundred dollars.

That plaintiff was a silk and fancy goods merchant in the city of New York, and the defendant a merchant in Burlington. No question was made but what the goods were received by the defendant, and that the same had not been paid for; and the sole defence made, was, that the goods were sold on a credit of six months, which had not transpired, at the time this suit was commenced.

On the trial, the plaintiff proved that the first bill of goods was purchased by one Charles A. Goodrich, a clerk of the defendant, who was sent to New York by the defendant, to purchase goods; and that the other bill was purchased by a Mr. Draper, a merchant of New York, for the defendant, and at his request. That at the time of the sales of said goods, respectively, bills were made out and delivered with the goods, and the same were offered in evidence, the bill for the first purchase was as follows:

"New York, May 2, 1848.

Mr. Noble Lovely,

Bought of C. F. Linsley,

Wholesale Dealer in Staple and Fancy Silk Goods."

"Six per cent off for cash."

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Here followed a list of articles and prices, footing at \$812,85.

The plaintiff objected to the introduction of any evidence by defendant to show that said sales were on credit, claiming that said bills were the only evidence to show the terms of sale.

But the court overruled the objection, and decided that evidence aside from the bills was admissible, to show that the sales were on credit; to which decision plaintiff excepted.

The defendant then proved that the prices in said bills, affixed to the several items, were what were called six months' prices, and such prices as other houses, as well as the plaintiff, sold the same goods for on a credit of six months, without interest, and that fact was not controverted by plaintiff. The defendant also offered the deposition of said Charles A. Goodrich, his clerk, which tended to prove that he bought the first bill of goods on a credit of six months, and that it was so understood at the time of the purchase. Those parts of the deposition, tending to prove that the goods were so bought, and that plaintiff, or his clerk so understood it, were objected to by plaintiff; the objection was overruled, to which decision plaintiff excepted.

The defendant also offered the deposition of Geo. G. Draper, who bought said last bill of goods; the plaintiff objected on account of interest in the event of this suit. And to show Draper's interest, he called one James W. Hickok, from whose testimony it appeared, that about the time this suit was brought, defendant failed, and that all his property, real and personal, was attached by plaintiff and other creditors, among whom were Draper, Aldrich, and Frink, of which firm witness, Draper, was a member; that after said attachment, all the attaching creditors (except plaintiff) and the defendant made an arrangement to have all the property so attached, assigned to witness, Hickok, to be by him converted into money, and applied *pro rata* upon the claims of such creditors, as should come in under the assignment, to the extent of fifty cents on a dollar of their debts; and if they received fifty cents on a dollar, they were to discharge their whole debts, and the overplus was to go to defendant. Said Hickok also testified, that if plaintiff should succeed in this suit, and collect his demand out of the property, there would not be sufficient to pay fifty cents on a dollar, &c. The court decided that said Draper was interested, and that his deposition could not be read. The defendant thereupon

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produced a release from said Draper to said Hickok, by which he released all his personal interest, and all his interest as a member of said firm, in and to said property, &c.; the execution of the release was proved; and the defendant then offered another deposition of said Draper taken subsequent to the execution of said release. The plaintiff objected to the sufficiency of the release, and also to the deposition; but the court decided that said release made the witness competent, and admitted the deposition; to which plaintiff excepted.

The deposition of said Draper, together with the depositions of five other merchants of New York city, and the evidence of several country merchants, tended to prove that in the city of New York, there was a class of mercantile houses, in the same general line of trade with the plaintiff, that were generally known as "six months' houses;" that the general and uniform course of business in that class of houses, was to give a credit for six months; that their goods were marked, and bills made at six months' prices; and that by the general course of dealing in that business, in that city, if a bill of goods were purchased, and the bill made out in the manner of plaintiff's bills to defendant, it would then be understood to be a sale on six months' credit, without any express stipulation to that effect between the parties. All this evidence was objected to by plaintiff; but was admitted by the court, to which plaintiff excepted. The defendant also offered said Hickok as a witness; plaintiff objected on the ground of interest; objection overruled, to which plaintiff excepted. The said Hickok testified that he had sold and conveyed a part of the real estate, so attached by plaintiff and other creditors; but that the personal property in his hands was ample to satisfy plaintiff's judgment should he recover in this suit.

The plaintiff offered four depositions of Leonard Jarvis, who was his clerk or salesman, at the times the goods in question were sold, and he testified that no credit was given at the time of the sales, and that nothing was said, either by himself or said Goodrich about credit being given, and that he did not understand that he gave any credit, &c. The plaintiff also offered some six or eight depositions of merchants in the city of New York, and also several depositions of country merchants, which tended to disprove any such custom or course of business and dealing, as to

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credit, as was claimed by the defendant. The plaintiff also relied upon these depositions to show, that by the general and usual practice of merchants in New York city, their clerks and salesmen are not authorized to sell goods upon a credit, without particular directions from their principals, though such practice was not universal, as clerks, who were considered especially confidential and trusty, were sometimes permitted to sell on credit, without consulting their employers. To show that this practice prevailed in plaintiff's house, plaintiff relied on the deposition of said Jarvis, and the depositions of four other persons, who had means of knowledge.

The defendant, to show that he was known to the plaintiff, offered evidence tending to show that the firm of Lovely & Hurlbut, of which he was a member previous to 1842, frequently purchased goods of the firm of Linsley & Nicholson, of which plaintiff was a member.

The plaintiff, on his part, offered evidence tending to prove that defendant had made no purchase of him from 1842, up to the time of the purchase now in question; and there was no other evidence upon this point on either side.

The plaintiff requested the court to charge the jury.

1. That in the absence of a special contract, or lawful usage to the contrary, the sales and delivering without payment, were sales for cash on demand, and that plaintiff would be entitled to recover.

2. That if Jarvis had a right to suppose from what took place at the sales, that they were for cash, and did so suppose, the sales were for cash, and the plaintiff was entitled to recover.

3. That the evidence of defendant as to the usage, claimed by him, both as to the construction of the bills, and the manner of obtaining a six months' credit, inspection of the forms of the bills, varied from and fell short of each usage claimed by the defendant, was not consistent with itself, and shows no uniform notorious and well settled practice or understanding, but modes of doing business in New York, which varied with houses, customs and circumstances, and that said evidence should be laid out of the case.

4. (If the evidence of defendant upon this point was such as should go to the jury,) that in order to find the customs claimed by defendant, they should find each to be uniform, generally known, well settled and notorious; and that if plaintiff's evidence

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upon the subject of the customs should be believed, neither of the customs claimed existed.

5. That if at the time, by the uniform, well settled and notorious usage of the traders in New York, clerks had not the power of giving credit, or by the uniform and well settled practice or course of business in plaintiff's store at the time, his clerks had not the power to give credits, and on either of these sales nothing was said about a credit, or on the sale in May, a credit was stipulated for by said Goodrich, with either of plaintiff's clerks; a credit in that case was unauthorized and plaintiff should recover.

The County Court,—POLAND, J., presiding,—charged according to the first and second request of plaintiff; but as to the third and fourth request, the court charged the jury that the determination of the case must depend wholly upon what they should find was the real agreement or understanding between the parties, at the time of the sale; whether it was a sale for cash on demand, or upon a credit of six months. That the evidence in the case did not prove any such *distinct, fixed and general* custom to give credit in houses of the character of plaintiff's, as by force of the custom or usage, would make a sale which the law would characterize as a *cash sale*, or sale on *demand*, into a sale upon a credit of six months, (if such a custom could be good.)

The jury were told, however, that the course of dealing in that branch of trade in which the plaintiff was engaged, was proper to be considered by them, in reference to what was the actual agreement and understanding between the parties, provided the circumstances attending the transaction were such as to satisfy them that the ordinary course of dealing really formed the basis of the contract between the parties.

The jury were also charged that the bills of the goods sold by plaintiff to defendant, were also to be considered in the same view as to the real agreement between the parties, and also that the evidence upon both sides, as to the use and meaning of the bills in the mercantile community, and by the plaintiff and other merchants of his class in New York, should be weighed in connection with and as explanatory of the bills.

As to the plaintiff's 5th request, the Court charged the jury that if the plaintiff was actually present, and knew of the sale on credit, by his clerk Jarvis, to the defendant's agents, he would be

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bound by the terms of the sale. The jury were also instructed, that if they found that plaintiff was in the habit of selling on credit, and Jarvis was employed by him as a salesman, and permitted to sell and did sell to the defendant on a credit, in the absence or without the knowledge of the plaintiff, the plaintiff would be bound by the terms of the sale, even if Jarvis exceeded his instructions in giving the credit, unless the defendant or his agent knew or had reasonable cause to know, that Jarvis was not authorized to sell on credit.

The jury returned a verdict for the defendant. The plaintiff excepted to so much of the charge of the court as is above detailed, and also to the various rulings of the court in the admission of evidence, as before stated.

W. W. Peck and *E. J. Phelps* for plaintiff.

I. The bill of sale was a contract. It contained all the elements of a contract; was accepted by defendant and signed by plaintiff; a contract is signed when it contains all the terms intended to be given to it and the party has affixed his name to it in such a manner as to show an intent to adopt it. It provides for no credit, and a new feature cannot be added to it by parol evidence.

Such instruments are always regarded as contracts within the operation of this general rule. Thus warranty cannot be shown by parol, where a bill of sale is given. This very point was decided in the case of *Davis & Aubin v. Bradley & Co.*, 24 Vt. 55. The following authorities show that the bill may be treated as signed. *Knight v. Crockfield*, 1 Esp. 190. *Saunderson v. Jackson*, 3 Esp. 180. *Welford v. Beazely et al.*, 1 Wils. 118. *Johnson v. Dodgson*, 2 M. & W. 653. *Plason v. Bailey et al.*, 14 Johns. 484. *Penniman v. Hartshorn et al.*, 13 Mass. 87. 1 Greenl. Ev. 262, 267. 2 Starkie Ev. 341. *Phelps v. Stewart et al.*, 12 Vt. 258.

II. That part of Goodrich's deposition, where the witness says "He (Jarvis,) understood that I was purchasing on credit. From the conversation we had in relation to my purchases of him, I understood, and I am perfectly confident that he understood, that if I purchased goods of him, Mr. Lovely for whom I purchased, was to have six months' credit," should have been rejected.

The question how Jarvis understood what was said, was for the jury. The witness should give the conversation or the substance

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of it. Not its effect upon the mind of another. What took place, might or might not justify his conclusion.

This objection is very important. The deposition is *ex parte*, and is the most material evidence offered by the defendant.

III. Draper was improperly admitted as a witness. His release was only of his own interest in the claim of his firm, upon the funds in the hands of the assignee. Until all demands against his firm were paid, he could have no separate interest. And until that took place, his release would not bar his partners from collecting the whole. If they did collect it, he would of course be benefitted in the settlement of the partnership concern between the partners.

IV. The evidence of Hickok was improperly received. His interest was admitted, and the plaintiff did not waive the objection by calling him as a witness *to the court*, on the question as to the interest of Draper. A waiver is a voluntary act and cannot be extended beyond what is meant. The rule has never been applied, except where a witness has been called by the objecting party, to testify in relation to the issue.

V. The evidence to prove a usage that where goods are bought in New York, without anything being said as to time of payment, a right to six months credit is thereby acquired, should have been rejected. Such a custom would be unreasonable and absurd, and contrary to the policy of law as to trade and to the fixed legal import of the terms of the contract. And the objection is not relieved by what was said in regard to the usage in the charge. Plaintiff's evidence did controvert that his house was of the character of six months' houses. 6 Taunton 316. 2 Saund. 567. *Leach v. Perkins*, 5 Shepley 462. *Catlin v. Smith*, 24 Vt. 85. *Thompson v. Ashton*, 14 Johns. 316. 9 U. S. Dig. 123.

VI. The charge on the subject of the usage was erroneous.

It involves a palpable contradiction. The court told the jury that the evidence did not establish a competent or legal usage, but that the usage so far as it was proved, might be considered in connection with the contract, and in view of the question whether the sale was made in reference to it.

It is a familiar rule that a custom or usage, even if proper in itself, cannot be regarded unless shown to be uniform, well settled,

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and so far notorious as to afford reasonable presumption that it is known to those concerned.

The whole evidence as to the usage should have been laid out of the case.

Or if left to the jury at all, it should have been with an explanation of its legal requisites, and the instruction to disregard it unless they found those requisites proved. And that if plaintiff's evidence was believed, they were not proved. *Bierns et al. v. Dodd*, 1 Selden 95.

VII. The charge as to the authority of the clerk to give credit, was erroneous.

If Jarvis was not authorized to sell on credit, and did so without the knowledge of his employer, the latter would not be bound unless he in some way affirmed the transaction.

And if notice to defendant of such want of authority were necessary, the usage restricting the powers of clerks in this particular, shown by the plaintiff, is reasonable and proper in itself, was fully proved, and should have been left to the jury as competent evidence of such notice.

Geo. F. Edmunds and *L. E. Chittenden* for defendant.

L. Parol evidence was properly received to show the stipulated time of payment. The bills of sale are silent upon the point; and even if we treat them as contracts, the proof as to the stipulated time, did not either vary, add to, or contradict their terms. It only supplied the truth upon the point in which the bills were silent: this is always admissible. But these bills are not contracts, or entitled to be treated as such. They are mere memoranda—evidence so far as they go of what has been contracted or done by the parties; but they do not exclude other evidence, of other terms in the contract of which they contain only a part. *Lockett et al. v. Nicklin*, 2 Exch'r Rep. 98 is in point. These bills contain intrinsic evidence of incompleteness, and do not therefore furnish even a presumption that payment was to be made immediately.

The phrase "six per cent off for cash," *ex vi termini* implies that the prices named in the bills are not cash prices. If they do not of themselves import a credit, these words raise such an ambiguity upon the face of the bills as will admit parol evidence to show the time of payment agreed upon when the goods were pur-

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chased, and the usage of trade to show the import of such a bill. *Hart v. Hammett*, 18 Vt. 127. *Edwards v. Golding*, 20 Vt. 80. *Lowry v. Adams*, 22 Vt. 160. *Gibbon v. Young*, 4 Eng. C. L. 93. *Smith v. Wilson*, 23 Eng. C. L. 169.

II. The objections to Goodrich's deposition.

The portion of this deposition objected to is admissible in any view of the case; clearly so under the instructions given to the jury. If from what transpired at the time of the sale, Goodrich had the right to understand it as a sale on credit, and did in fact so understand it, the law will treat it as a sale on credit. If he and Jarvis understood it was a cash sale, the law will so treat it, although the purchaser would have had a right to treat it as a sale on credit. It was therefore proper for Goodrich to state not only what did transpire, but what his understanding of the contract was.

Where the contracting parties are witnesses, the *best* evidence is their own statement of what their understanding was. The objection is founded upon a verbal criticism which the language of the deposition will not justify. The meaning of the witness is, that Jarvis knew he was purchasing on credit, and that in making the purchase he, the witness, was buying on credit. The word "understood," as here used, is synonymous with "knew," "thought" or "believed," and if either of these words had been used, the deposition would not be subject to this objection.

But it is shown that this opinion was derived from the circumstances of the transaction in which he and Jarvis were the actors; and by the settled law of this State, his opinion or understanding, or whatever it may be called, as to the terms of the sale, derived from and founded upon these circumstances, is evidence. *Lester v. Pittsford*, 7 Vt. 158. *Morse v. Crawford*, 17 Vt. 499.

III. The interest of Draper, in the event of this suit, (if he had any,) depended on his right to compel Hickok to pay the fund to him if this suit failed.

The release of Draper cuts off all claims of every nature, and in every right, which he or the firm had to the fund, so that in no contingency could he have any benefit from it. *Pierson v. Hooker*, 3 Johns. 70. *Bulkeley v. Dayton*, 14 Johns. 387. *McBride v. Hogan*, 1 Wend. 326, 336. *Morse v. Bellows*, 1 N. H. 550, 567. *Rasinky et al. v. Ruddock*, Cro. Eliz. 648.

IV. Hickok had no interest in the event of the suit; because,

1. The verdict would not conclude or affect him. His liability

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was remote and contingent. Such circuitous interest the law does not regard; the verdict and judgment must operate *directly* upon the witness. 2. The witness held full indemnity in his own hands with which to pay the judgment of the plaintiff, and it was thus indifferent to him how this suit should terminate. It is true that if the witness only had a *remedy over*, against some other person, his interest would exclude him; but here he holds the fund in his own hands for his own security. The distinction is broad, and is recognized in all the following cases. *Chaffes v. Thomas*, 7 Cow. 358. *McLeod v. Johnston*, 4 Johns. 126. *Lake v. Auburn*, 17 Wend. 18. *Briggs v. Crick*, 5 Esp. Cas. 99. *Carter v. Pearce*, 1 Term 163. *Allen v. Hawks*, 13 Pick. 79. 2 Rawle 279. But if he was interested, his testimony was still admissible. The plaintiff had called and used him on the same trial, and thus made him his own witness. The party, by calling, swearing, and using him, makes him *a witness in the cause*. He admits his competency and declares him to be worthy of credit. 2 Wend. 166, 200, 201. *Fulton Bank v. Stafford*, 7 Cow. 288. *Webster v. Lee*, 11 Pick. 269. *Morgan v. Bridges*, 5 Mass. 884. 3 Eng. C. L. 861. 1 Phil. Ev. 273. 1 Starkie Ev. 131.

V. The charge of the court on the 8d, 4th and 5th requests was clearly correct.

The evidence of the defendant, contained in his deposition, was offered, to show the actual basis of the contract of the parties, and this was the only effect given to it by the court.

The charge was in exact accordance with the 8d request. The court instructed the jury that no usage or custom was proved; and that they must decide upon the real contract of the parties made at the time; but that the usual course of dealing of the plaintiff and others might be considered by the jury in connection with the circumstances in finding what the contract was, provided they should find from the other evidence, that this course of dealing in fact formed the basis of the contract. This in substance required the jury to disregard the evidence entirely unless they believed that the parties themselves made the course of dealing proved by it, a part of the contract.

The case did not entitle the plaintiff to instructions according to the 5th request. The evidence tended to show that the plaintiff was present at the time of the sale by Jarvis. The court there-

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fore properly charged the jury that if the plaintiff was present and knew of the sale on credit by his clerk, Jarvis, he would be bound by its terms. In other respects the charge on this point is subject to no legal objection.

The opinion of the court was delivered by

BENNETT, J. The only question litigated in the court below, was whether the action was *prematurely* brought or not. The questions raised upon the bill of exceptions, are somewhat numerous; and have been discussed with much ability by counsel; and it becomes the duty of the court to dispose of them, as far as the interest of the parties may require.

It is claimed by the plaintiff, that the bills of the goods sold and delivered to the defendant's agent, at the time of the sale, embody the contract, and preclude the introduction of parol evidence to show that the sales were made upon a credit of six months. The bills simply state, that on a given day, the defendant bought of the plaintiff certain articles, at given prices, with a memorandum on the margin, "six per cent off for cash." The bills are not subscribed by either of the parties; but we do not put our decision on that ground. If the bill of sale expresses the contract of the parties, it cannot be controlled by parol evidence any more than any other written contract. But the bills of sale in this case do not import a contract; and here is the error in the argument.

The bills were given, not to express a contract, but in consequence of one having been previously made; and they are simply *declaratory* of a fact; and out of this, with other things, a contract is to be made. The question is not, whether the defendant can contradict any fact stated in the bills; but whether he can show the true contract of the parties, consistent with those written declarations. The case of *Ford v. Yates*, 40 Com. Law Rep. is perhaps the strongest case to be found in favor of the plaintiff's views on this question. In that case, there was a written contract to deliver goods, and no time for the payment of them, mentioned in it; and it was held, that the delivery and the payment were *contemporaneous* acts; and that parol evidence was not to be received, to show that the payment was to be made at a future day.

The court in that case, assumed the ground, that the memorandum entered into by the broker, was a binding memorandum of

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the contract of the *purchase and sale* under the statute of frauds; and it is only upon that supposition, that the case is to have weight as an authority. The cases in this state have all gone upon the ground that the bill of sale embodied a contract. *Lockett et al. v. Nicklin*, 2 Exch'r Rep. 98 is not, I apprehend, to be distinguished in principle from the case at bar; and in that case the parol evidence was received.

II. We think Draper was a competent witness after the execution of the release to Mr. Hickok. He released all claims, which he had, as an individual, or as a partner of Draper, Aldrich & Frink, upon the funds in the hands of Hickok.

It is a common principle, that where two or more have a *joint personal interest*, the release of one is the release of all, and bars the others. *Pierson v. Hooker*, 3 Johns. 70. *Bullley v. Dayton*, 14 Johns. 387. In this latter case, the release was in form like the one in this bill of exceptions. It was a release by one partner of all right and claim as a partner; and yet its effect was held to be a discharge of the whole partnership debt.

III. We cannot see that Hickok had any certain interest in the event of this suit. He held the funds as the assignee of Lovely, as a mere stake-holder; and in regard to his interest, as it is said, growing out of the covenants of his deed of Lovely's real estate, it may be answered, that Hickok has a full indemnity in his hands, in case the plaintiff recovers, out of which the judgment may be satisfied; and it is a *non sequiter* that the plaintiff would even levy on the real estate, in case of a recovery, and thereby disturb the easements in Hickok's deed. In such a case, the interest of the witness must, at most, be contingent. *Enters v. Peres*, 2 Rawle 279.

Besides we think, that when he had been called as a witness, and sworn in chief and examined, though upon a question to the court touching the interest of another witness, still the party calling him, cannot object to the opposite party's examining him, upon the merits of the cause to the jury.

It is none the less a waiver of the interest of a witness by the party calling him, though called to lay the ground for the exclusion of another witness.

IV. So much of the deposition of Goodrich as goes to state how he "understood" the purchase to have been made, we think admissible. His understanding on that occasion was the understanding

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of Lovely, his principal; and to determine what or when a contract is made, we must ascertain the understanding of each of the parties. The weight of this would be for the jury. When he states, how he is confident the contract was understood on the part of the plaintiff, and that he or his agent understood it to be a sale upon six months' credit, this is nothing but the opinion of the witness, and is one of the facts to be found by the jury, from the evidence in the case.

In admitting this part of the deposition there was, we think, error. If at the time of the sale, Goodrich had supposed that the plaintiff had understood the transaction to be a sale for cash, and had taken no means to correct the error, but perfected the sale with an intent to claim it to have been a sale upon a credit of six months, this might be important for the plaintiff; and doubtless he might prove it.

V. In regard to the *custom or usage*, we may remark, it can never be given in evidence, to *vary or control an express contract*; but its *office* is, to aid in ascertaining what the true contract of the parties was, and its nature and extent, which otherwise might be indeterminate and uncertain, arising from *implications, presumptions*, and acts more or less *equivocal*. The office of an *usage* is strictly one of *exposition*, and is allowable to be given in evidence as one means of arriving at the *intention* of the parties; and can never be received to thwart it, when it is clearly and fully expressed. The *usage* set up in this case, that it may discharge the office of *exposition*, must be found to be the *general usage* of the whole of that class of houses in the city of New York, to which the plaintiff belonged; and so *well established* and *uniformly acquiesced in*, and for such a length of time, that the jury might be fairly justified in inferring that it was known to the contracting parties, and that it entered into their minds, and made, by *implication* a part of their contract. If such an usage is not proved, it should be laid out of the case; and if the offer is not to prove such an usage, the evidence should be excluded. Nothing short of this will answer.

In the present case, there was, as the court below held, a failure to prove an usage, (which in most cases would be a question for the jury,) and the jury were directed to lay it out of the case, as an usage.

VI. We see no objection to the parol testimony to explain the

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meaning of the words endorsed on the bills of sale, "six per cent off for cash," or to the charge of the court upon it. The words are of an equivocal character, and in such a case, it is competent to prove to the jury how they are understood by an usage among men engaged in the same class of trade with the plaintiff. 2 Cowen & Hill's notes to Phillips on Ev. 1418-19.

Though the usage was not proved, yet the court told the jury, "that the course of dealing in that branch of trade, in which the plaintiff was engaged, was proper to be considered by them, in reference to what was the *actual agreement* between the parties, providing the circumstances attending the transaction were such as to satisfy them, that the ordinary course of dealing really formed the basis of the contract of the parties."

We think there was error in this part of the charge, and that it was eminently calculated to mislead the jury. A general custom or usage must be proved before it can have effect, and it must be such a one as the law recognizes; and unless such a one is offered to be proved, the evidence should be excluded; and in this very case, if the offer had been to prove just what appeared on the trial, and no more, the court would, no doubt have excluded the evidence. It is difficult then to see how, "the course of dealing in that branch of trade," in the language of the charge, if an usage is not proved, can be taken into account by the jury, in determining what was the actual contract of the parties. We think the charge in effect, is, that though the usage was not proved so as to make it evidence, tending to prove a sale upon an implied credit of six months, yet, still it was so far proved that it might be weighed by the jury in determining what the contract was.

If the evidence does not prove a general usage, it cannot be received as an *item* in the testimony, as tending to show in connection with other testimony, the true contract of the parties; and we think the plaintiff was entitled to a charge, that the evidence of the usage was not such, as should affect him, as any proof that the parties intended the sale in question to be a credit sale.

The case of *Beirne v. Dowd*, in the court of appeals in New York, 1 Selden 95, has a close analogy in principle with this case, and we think, that case was well decided.

If the evidence had showed that it had been the *uniform and unvaried custom* of this plaintiff himself, to sell his goods upon a

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credit of six months ; and that this was known to the defendant, at the time he purchased, it would have been quite another question, whether this should have gone to the jury, as evidence tending to prove an *implied* credit.

The charge of the court in other respects, we see no objection to. The bills, and the testimony relative to the meaning of the words endorsed upon them, was properly for the jury, and was submitted to them upon the correct principle.

We think there was evidence tending to prove that the plaintiff might have been present at the time of the sales by the clerk, and if so, he could not complain that the clerk exceeded his authority. Besides, if not present, the clerk is to be regarded as the general agent of the plaintiff, and if he exceeded his authority in selling upon a credit, the plaintiff must be bound by it, if neither the defendant nor his agent was chargeable with notice of the extent of the authority of the agent.

For the reasons assigned, we must regard it as a mis-trial, and the judgment is reversed.

WILLIAM P. BRIGGS v. GEORGE B. OAKS. AND THE SAME
v. JULIUS H. BOSTWICK.

Reference. Issue. Landlord and Tenant. Replevin.

Where the parties mutually agree upon a reference of a suit; by the practice in this State it is understood, that the subject matter of the suit is referred, without reference to the form, and the referees may decide the case upon its merits upon any state of evidence, which could be admitted, by any amendment, in the power of the court to grant; and when the parties refer the case, "to be decided according to law," this limitation in the rule of reference, upon the power of the referee, is to be understood to refer to the merits of the case, rather than to the form of the issue.

Davis v. Campbell, 23 Vt. 236. *Eddy v. Sprague*, 10 Vt. 216, and *Mazfield v. Scott*, 17 Vt. 684, cited with approbation, as to the practice in this State, in regard to the reference of causes.

Where a case is referred, the reference will not fail, even where it appears on trial, that the party has mistaken his form of action. REDFIELD, CH. J.

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If the landlord leases the stock, with the farm, to a tenant, upon shares, and there is an actual or implied contract between them, that the yearlings raised from the cows upon the farm, shall be kept upon the farm until the expiration of the term of the lease; by this contract, the tenant's title to one-half of the yearlings, as an independent and absolute tenant in common, will not become perfected until he has fulfilled his contract; and any attempt, on the part of the tenant to dispose of them, before he has fulfilled his contract, will be such a wrong, as will determine the tenancy as to the yearlings.

And the landlord under such a contract, may be regarded as the general owner of the stock, and as having the paramount title, and the tenant as owning one-half conditionally, that is, when the term expires, if he performs his contract; and if the tenant, without the consent of the landlord, disposes of the yearlings before the term has expired, and before he has fulfilled his contract, the landlord may maintain replevin for the yearlings, both in the *cepi* and *detinet*.

And where the contract provides that the property shall remain on the farm until the expiration of the term of the lease, and then be divided, the tenant has no absolute vested right in the property until the expiration of the lease.

REPLEVIN for 24 yearlings. The cases were referred under a rule of court, by agreement of the parties, "to be decided according to law," to referees, who reported substantially the following facts :

That the plaintiff owned a farm in Richmond, with the stock and tools thereon, which he leased to one Jonathan and John G. Taggart for the term of two years from April first, 1849. That the contract as to the lease and its provisions was a verbal one, but the parties referred to a previous written lease between plaintiff and one Stearns, as containing substantially the terms of the contract between them. The farm by the terms of the written lease was let upon shares, and said Stearns was to pay plaintiff for one-half of the cows, and the same were to remain plaintiff's until paid for, and none of the cows were to be sold without the consent of both parties, and so with the butter and cheese made on the farm, &c. And to cultivate the farm in a husband-like manner, &c.

That the terms of the written lease were varied in some respects by a verbal agreement between the plaintiff and the Taggarts; and that by said agreement, the plaintiff was to furnish all the cows kept on the farm, and they were all to remain his property until the Taggarts paid him for one-half of them. That the Taggarts were to raise twenty-five calves from the said cows upon the farm; and that each party was to own one-half thereof. That said Tag-

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garts took possession of the farm and stock in April, 1849, and carried on the farm under the lease. The twelve yearlings in controversy were calves in the spring of 1849, from the cows thus leased by plaintiff. The referees decided that plaintiff owned one-half of the calves, and that the Taggarts owned the other half.

They also found that in the summer of 1849, Jonathan Taggart agreed with plaintiff, that if he would assume certain debts which they owed, and would advance them flour, pork, and other articles that they might want in carrying on the farm, that all their share of the personal property then or thereafter to be raised or made on the farm, should belong to the plaintiff, and be held by him as security for the payment of whatever balance might be found due from them to plaintiff on a full settlement thereafter, including all such debts so assumed and all advances and debts accruing thereafter. That the plaintiff thereupon assumed the debts and made the advances.

That the son, John G. Taggart, was soon after informed of the agreement, and assented to it, by remaining on the farm and receiving the benefit of it, without objecting to the terms of the agreement. That when this agreement was made the twelve yearlings, (then calves,) were on the farm and in the possession of the Taggarts, and so remained until the summer of 1850, when the pasturage being insufficient, they were removed to another pasture of the plaintiff's, (not leased to the Taggarts,) where they remained until after haying, a period of about three months, when they were again taken back to the farm leased to the said Taggarts, and there remained till John G. Taggart sold and delivered them to one Bennett, about the 4th day of November, 1850.

That on the 15th day of August, 1850, Jonathan Taggart died, and in October, 1850, the plaintiff was appointed administrator of his estate, and as such went into possession jointly with John G. Taggart of said farm and stock. And that on or about the 4th of November, 1850, the twenty-five yearlings being on the farm, and in the joint possession of plaintiff and said John G., the latter, without the consent or knowledge of plaintiff, sold to one Bennett and Shepard the equal and undivided half of the yearlings, and delivered them to said Bennett, who, without the knowledge or consent of plaintiff, removed them from the farm and drove them to his own field.

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The referees found that there was no express agreement, that the calves should be kept on the farm, and not removed therefrom without the consent of either party till the expiration of the lease. But that good husbandry, and the proper and profitable management of the farm and stock, required that they should be raised and kept on the farm till the expiration of the lease. And that it was understood between the parties, that the twenty-five calves were to be raised for the purpose of stocking the farm, and of supplying with these calves, the places of such animals as might die or be sold from the farm. That therefore there was an implied agreement between the parties, that the calves should be raised and kept on the farm till the expiration of the lease; and that as between the plaintiff and said Taggarts, neither party could remove the animals from the farm during the lease, without the consent of the other.

That a few days after the sale by said John to said Bennett, as aforesaid, the plaintiff retook possession of the twenty-five yearlings, and drove them back to the farm; that they remained on the farm in possession of plaintiff till about the 24th day of November, 1850, when said Bennett demanded possession of them, which the plaintiff refusing, said Bennett with force and violence, and with the aid of a number of men, after a severe contest with the plaintiff, seized the cattle and drove them away; that soon after, he and said Shepard, without the knowledge or consent of the plaintiff, drove them to Jerico, and sold, not the moiety, but the twenty-five yearlings to the defendant, Oaks, and to one Bostwick; that said Oaks and Bostwick divided the cattle between them, that said Bennett and Shepard sold the twenty-five yearlings for \$240, warranting the title thereof to said Oaks and Bostwick, and in said division Oaks, the defendant, took the twelve claimed in this writ; that a few days after, the plaintiff demanded possession of the said twelve yearlings of Oaks, which he refusing, the plaintiff brought the present suit of replevin.

The referees decided that neither John G., nor any purchaser under him, had the right to take the yearlings from the possession of the plaintiff and from the farm, till the expiration of the lease; that the plaintiff had the right to retain the possession of the yearlings and keep them on the farm till the expiration of the lease, and for that purpose had the right to demand them from Oaks,

and from a J. J.

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the defendant, and that upon such demand being made, defendant's detention of them was unlawful.

The county court rendered judgment on the report for the plaintiff.

Exceptions by defendant.

Underwood & Hard for defendant.

The contract, between Briggs and Jonathan Taggart, being void as to subsequent purchasers, for want of a change of possession, the plaintiff's title to the yearlings in question, depends solely upon the construction and effect of the original contract between Briggs and the Taggarts. As to the effect of that contract, the defendant insists,

1. That it is in terms and effect a *lease* of the farm, and that consequently Briggs had no legal interest in the products until actual delivery. The written contract between Stearns and Briggs, which the referees find was adopted in the subsequent contract between Briggs and the Taggarts, contains all the technical words appropriate and necessary to constitute a lease. *Hurd v. Darling*, 14 Vt. 214. *Hurd v. Darling*, 16 Vt. 377. *Noyes Adm. v. Maxwell*, 14 Vt. 14. *Hadley v. Havens*, 24 Vt. 520. *Stewart v. Doughty*, 9 Johns. 108.

2. That if the contract between Briggs and the Taggarts, did not amount to a lease, the parties thereto were joint owners of the products of the farm, and the defendant having purchased the interest of John G. Taggart therein, became *tenants in common* with the plaintiff, of the property in question. Consequently this action cannot be maintained. *Putnam v. Wise*, 1 Hill 234. *Ladd v. Billings*, 15 Mass. 15. *Prentice v. Ladd*, 12 Conn. 381. *Schrogham v. Carter*, 12 Wend. 131. *Barnes v. Bartlett*, 15 Pick. 71. *Willis v. Noyes*, 12 Pick. 324.

The case of *Lewis v. Lyman*, 22 Pick. 487, relied upon by the plaintiff, is not in the least inconsistent with the defence in this case. That was an *action on the case* against a sheriff for the default or misconduct of one of his deputies, in attaching and selling the tenants interest in some hay, and calves, raised under a contract similar, in most respects, to the contract in the present case; the court held that the plaintiff was entitled to recover only such damages, as would put him in as good a situation, as to property,

all a mistake

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as he would have been in, if the wrongful act of which he complained, had not been committed by the defendant, and not the value of the property.

Wm. P. Briggs and Peck & Bailey for plaintiff.

1. The report of the referees is conclusive, and the court will not look into it, with the view to correct the errors relating to questions of law. *White v. White*, 21 Vt. 254. *Eddy v. Sprague*, 10 Vt. 216. *Davis v. Campbell*, 23 Vt. 236. *Maxfield v. Scott*, 17 Vt. 634.

2. The right of Taggart, the tenant, was in the nature of a *chose in action*, an *inchoate* right growing out of an executory contract and dependent upon the ultimate performance of the contract. *Lewis v. Lyman*, 22 Pick. 437. *Paris v. Vail et al.*, 18 Vt. 277.

3. In every contract of tenancy of this kind, the law upon the bare relation of landlord and tenant, implies an agreement, that the tenant is to carry on the farm in a prudent and husband-like manner. *Brown v. Marshall*, 1 Marsh 567. (4 E. C. L. 349.) *Lewis v. Lyman*, 22 Pick. 437.

4. It is well established, that if the agreement, by which the products of the farm and stock was to be the property of the plaintiff until he was paid for the advances he made, and the liabilities he incurred, had been a stipulation in the original contract, the creditors of the Taggarts could acquire no interest in the property by attachment. *Smith v. Atkins*, 18 Vt. 461.

This case differs materially from an ordinary case of sale or mortgage of personal property where the vendee or mortgagee had no previous interest in the property. The Taggarts having no interest in the property, except by virtue of the original contract, and the plaintiff being the owner of the farm and the stock thereof, in which the property in question is the issue, was notice to the world of a paramount interest in the landlord, and whoever took the interest of Taggart, is bound by the actual relation of the parties to the property, and no change of possession is necessary. *Griswold v. Smith*, 10 Vt. 452.

The opinion of the court was delivered by

REDFIELD, CH. J. These two actions were referred by rule of court, to be decided according to law. It is said in *Davis v.*

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Campbell, 23 Vt. 286, that this limitation, in the rule of reference, upon the power of the referee, is to be referred to the merits of the case, rather than the form of the issue. And in *Eddy v. Sprague*, 10 Vt. 216, it is considered, that when a case is referred, the referee may decide the case upon its merits upon any state of the evidence, which could be admitted by any amendment in the power of the court to grant. The same rule has been repeatedly recognized in other cases, by this court. We have not therefore on this point had occasion to go farther. But the case of *Maxfield v. Scott*, 17 Vt. 684, seems to go the length of saying it is the subject matter of the suit referred, without reference to form, and that seems sensible and sound. It is by no means certain that the rule cannot safely go that length. I cannot comprehend, why the reference should fail, even where it appears on trial that the party has mistaken his form of action. It is perfectly within the power of the court to allow an amendment changing the form of action, if the declaration still describes the same cause of action. This is every day's practice in the English courts, when it is desired. In this state, be sure, we have not commonly allowed such amendments, perhaps, on account of our attachment law, and the liability of special bail. And in many other particulars of civil procedure we are almost half a century behind the courts in Westminster Hall. I am sorry always to turn a party out of court, after his case is tried, and especially by a referee agreed to by the parties, and he is shown to have a just cause of action, upon the merest shadow of a form that either is already, or is speedily destined to be exploded. And especially where repeated decisions, at common-law can be found, disregarding it. And that it was competent for the county court to have allowed an amendment, in this case changing the form of action, will be seen by referring to 1 Chit. Pl. 197. *Billings v. Flight*, 6 Taunton 419. *Leavitt v. Kibblewhite*, 1 Taunt. 483, 459. Barnes' Notes 5. 1 Petersdorff 524. But this is done under a rule to exonerate bail. This alone disposes of the case.

But if the case of *Lewis v. Lyman*, 22 Pick. 437 is sound law, and I confess myself disposed to so view it, I think there is no difficulty in holding, that the action of replevin will lie in this case. That contract was almost identical with the present. One would almost believe this contract was copied from that report, its cor-

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respondence is so remarkable. And the referees have found in this case and there is every reason to suppose the finding according to the equity and justice of the case and the expectation of the parties, that there was an implied understanding that these yearlings should be kept upon the farm till the expiration of the term. Thus by the contract virtually, Taggarts title to one-half the property, as an independent and absolute tenant in common, would not become perfected until they had fulfilled their contract. This being so, any attempt to dispose of them would be such a wrong as would determine the tenancy. It has been held, in regard to real estate, that repudiating the tenancy, by the tenant, and denying the title of the landlord worked a forfeiture of the term, and would enable the landlord, to maintain ejectment, at once. This is familiar law in England, and is laid down in all the elementary books upon the subject. And it would be hard if it were not so here, since we have adopted the rule in this State, that after such repudiation is made known to the landlord, the statute of limitation begins to run against him, which is equivalent to saying ejectment will lie in his favor.

And it is only applying the same principle to personal property when we hold that one having a special property in chattels, forfeits his interest, by putting them to a different use from what the contract allows. *Swift v. Mosely*, 10 Vt. 208. And here, upon the contract, and the authority of the case in 22 Pick. it seems to us, that the plaintiff may justly be regarded as having the paramount title, as the general owner of this stock, and the Taggarts as owning one-half conditionally, i. e., when the term expired, if they performed their contract. This construction is consistent with the written contract and the finding of the referees, and is the only one which seems to reach the justice of the case, and is far more in accordance with sound policy, and the just rights of the parties, and the real interests of tenants, than any other. And in this view the plaintiff might well maintain replevin, both in the *cepi* and *detinet*. We are therefore disposed to affirm the judgment upon both grounds.

As these cattle are the offspring of cattle belonging to plaintiff, no difficulty arises in regard to his property, on account of the thing not being in existence at the time of the contract, as was held in *Smith v. Atkins*, 18 Vt. 461.

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The case of *Hurd v. Darling*, 14 Vt. is in many of its features like this case, but not more so than *Smith v. Atkins*, 18 Vt., and in this case there was no written contract between these parties; one was referred to only, between other parties, and that was departed from by parol, thus leaving the whole matter open, and the referees have found this contract to have been, in its intention, like that of *Smith v. Atkins*, i. e., that the property should remain on the place till the end of the term and be then divided, which we consider as giving the tenants no absolute vested property till that time.

Judgment affirmed.

WILLIAM P. BRIGGS v. DANIEL BENNETT AND OTHERS.

Reference. Issue. Landlord and Tenant. Trespass.

Under the practice in this state, it is understood, that when the case is referred, this will allow the plaintiff to present any case, which he could have shown in court, either on his first declaration, or any declaration, which it was competent for the court to allow him to file.

If a tenant by departing from his contract, and putting the property to a different use, is guilty of such an abuse as forfeits his estate, and revives the right of the landlord or general owner to immediate possession; this will enable the landlord or general owner to maintain trespass for any interference with the property by a stranger, after the tenancy is so determined.

TRESPASS for taking and driving away twenty-five yearlings. The case was referred under a rule of court to referees, who reported in substance: That the plaintiff leased to one Jonathan and John G. Taggart, a farm in Richmond, with the tools and stock thereon, for two years, from April first, 1849, and referred to a certain written lease between plaintiff and one Stearns. That by the contract between plaintiff and the Taggarts, the cows put on the farm were to belong to the plaintiff till the Taggarts paid for one half of them. That the Taggarts were to raise twenty-five calves from the cows on the farm, each party to own one-half of them.

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The Taggarts took possession of the farm, and carried it on from April first, 1849, under the lease; the said Jonathan Taggart died in August, 1850, and in October the plaintiff was appointed administrator, and as such went into possession of the farm and stock jointly with said John G. Taggart, who was a son of the said Jonathan.

That on or about the 4th day of November, 1850, the said John G. Taggart, without the knowledge or consent of plaintiff, sold to Bennett and Shepard, two of the defendants, an undivided one-half of the twenty-five yearlings, which were calves in the spring of 1849, and had been raised on the farm by said Taggarts, and delivered them to said Bennett, who drove them from the farm to his own field. That a few days after the plaintiff took possession of the yearlings, and drove them back to the farm, that they remained in the possession of the plaintiff till the 24th day of November, 1850, when said Bennett demanded possession of them, and upon plaintiff's refusal to deliver up possession of them, said Bennett and the other defendants, with force and violence, and after a severe contest with the plaintiff, took possession of the twenty-five yearlings, and beat and injured the cattle somewhat in driving them away, and drove them away and sold them. That this taking away of the cattle was the trespass complained of.

The referees found, that good husbandry, and the proper and profitable management of the farm and stock, required that the calves should be kept and raised on the farm till the expiration of the lease; also that it was understood between the plaintiff and said Taggarts, that the twenty-five calves were to be raised for the purpose of supplying, with these calves the places of such animals as might die or be sold off the farm, and for stocking the farm.

That though there was no express agreement, still there was an implied agreement, and an obligation between the parties, that the calves should be raised and kept on the farm till the expiration of the lease; and that as between the plaintiff and the Taggarts, neither party could remove the calves from the farm during the lease without the consent of the other.

The referees decided that said Bennett, by this purchase of said John G., took the yearlings, subject to the same conditions upon which said John G. held them, i. e.: that they should re-

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main upon the farm till the expiration of the lease; and that taking them from the possession of the plaintiff, and from the farm by force, and against the will and resistance of plaintiff, was unlawful and tortious; and that plaintiff can sustain this action of trespass against the defendants.

For a more full statement of the facts in this suit, see the case of *Briggs v. Oaks*, reported in this volume.

The court rendered judgment on the report for the plaintiff. To which the defendants excepted.

Geo. F. Edmunds for defendants.

Wm. P. Briggs and Peck & Bailey for plaintiff.

The opinion of the court was delivered by

REDFIELD, Ch. J. We are not aware that any different principle is involved in this case, from that decided in the same *plaintiff v. Oaks*.

I. If the form of action was misconceived, that will not be fatal to plaintiff's right to recover upon the report in his favor, inasmuch as it was the case referred, which will allow the plaintiff to present any case which he could have shown in court, either on the first declaration, or any which it was competent for the court to allow him to file. And as the power of amendment extends even to the changing the form of action; if case is the proper form of declaring, it was competent for the county court, to have allowed the plaintiff to substitute that form of declaring.

And in addition to that, the Legislature, at its last session, enacted, that in any suit for trespass, pending in any court in the state, the court might, on the application of the plaintiff, allow him to join counts in case, which would clearly apply to the present case. So that if we should reverse the judgment on the ground that such was not the law at the time of the judgment in the county court, we should only have to remand the case for them to proceed with it according to law, or ourselves enter up judgment according to the existing law.

II. And according to the view taken in the case of *Oaks*, the tenant John G. Taggart, by departing from his contract, and putting the property to a different use was guilty of such an abuse,

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as forfeited his estate, and revived the right of the general owner to immediate possession, and will thus enable him to maintain trespass for any interference with the property by a stranger, after the tenancy was determined.

Judgment affirmed.

ALANSON B. SHEPARD v. WILLIAM P. BRIGGS.

Sale and Change of Possession.

Where B. had leased a farm to T., and by an agreement between them, B. was to have a lien upon the products of the farm, for advances made and to be made, and among the products of said farm there was a quantity of cheese, which they carried to a depot, and left it with the agent, to be sent to a certain house in New York, with the understanding that B., who owned one-half by the terms of the lease, and had a lien upon the other half of the cheese by their agreement, should receive the money for all the cheese, when sold, and account to T. for his part of the same on general settlement. After they had so left the cheese, and on the same day, T. sold his interest in the same to S., without the knowledge of B., and with the intention, on the part of T. and S., to embarrass or defeat B., in enforcing his lien, and securing his account against T.; it was held, that this sale from T. to S. was void as to B.

And where T. and S. went to the property which had thus been put into the custody of the carrier by B. and T., and looking at the cheese T. said to S., I deliver this to you, but did not move the property, or notify the agent of the carrier, that any change had been made in the ownership or in the consignors, it was held, that this was no change of possession, and that it could have had no effect upon B., even if the contract had been *bona fide*.

THIS was an action on the case, brought by the plaintiff to recover of the defendant one-fourth part of the amount for which he sold a quantity of cheese, raised on the farm leased by defendant to one Jonathan and John G. Taggart. The case was referred to referees under a rule of court, who reported substantially the following facts:

That defendant leased a farm in Richmond, with the tools and stock thereon, for the term of two years from April first, 1849, to

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one Jonathan and John G. Taggart. That the said Taggarts, acting under the lease, made a quantity of cheese, about 6662 pounds, of which, according to the terms of the lease, they owned one-half, and the defendant the other half; that in the latter part of October, 1850, Briggs, the defendant, and John G. Taggart, (Jonathan Taggart being dead,) took said cheese from the farm to the depot in Richmond, had it weighed, and marked B. & T. for Briggs and Taggart, and deposited at said depot, in the custody and care of the agent of the station, with directions to have it sent by railroad to Jewell, Harrison & Co., of New York.

That on the same day said John G. Taggart went to the plaintiff and they, without the knowledge of the defendant, entered into the following agreement: John G. Taggart drew a draft, payable at three months from date to the plaintiff or order, upon Jewell, Harrison & Co., for the amount of the cheese at five cents per pound; plaintiff endorsed the draft, and it was discounted at the Bank of Burlington. Taggart wrote a letter to Jewell, Harrison & Co., informing them that he had shipped so much cheese to them, and that he had drawn upon them for half the amount, and that they might pay Briggs, the defendant, for the other half.

That said Taggart, also, sent an invoice of the cheese made out in the name of Briggs and Taggart, but did not inform them that the cheese was sold to the plaintiff. Taggart and the plaintiff agreed that the money received from the Bank should be left in the hands of a third person, until the cheese reached its destination, but the money was finally paid over by the plaintiff to Taggart, upon the same day that the transaction took place.

That for further security, it was agreed between Taggart and plaintiff, that said Taggart should deliver the cheese to the plaintiff, and that it should be his property until it reached its destination, and they went to the depot, where the cheese was, and said Taggart showed it to plaintiff, but the cheese was not moved, or its possession in any way changed, nor did it appear that any notice was given to the station agent, or to the defendant of any transfer or delivery of the cheese to plaintiff; and the same afternoon the cheese was sent on the cars towards its destination; but Briggs, the defendant, hearing of the transaction, followed the cheese to Burlington, and there took possession of it, and sent it to another

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firm in New York, by whom it was sold, and the proceeds sent to the defendant.

Taggart's draft on Jewell, Harrison & Co., was protested, and finally paid by plaintiff, Shepard. That it also appeared that there were large dealings and accounts between defendant and Taggart, that in the summer of 1849, an agreement was made between defendant and Jonathan Taggart, by which the property then on the farm, or thereafter to be made or raised on it, should belong to Briggs, the defendant, or be held by him, as security for debts assumed, and advances made by the defendant for the Taggarts, and for the balance that might be due defendant, on a future settlement; that John G. Taggart assented to this agreement, not expressly, but impliedly, by receiving the benefit of such agreement, after having knowledge of it from his father, Jonathan Taggart, and making no objection to it; and that defendant made advances, as by the agreement required; and that the cheese was made on the farm by the Taggarts after the said agreement was made. The counsel for the plaintiff contended that the transactions herein before detailed, constituted a sale of the cheese from Taggart to the plaintiff, or of his (Taggart's) interest in it; if not a sale, then it constituted a mortgage or pledge. But the referees decided, that the transaction was not a sale, nor a mortgage, nor a pledge *bona fide* made between them; but that it was a contrivance entered into between them, to enable Taggart, without the knowledge of defendant, to obtain the pay for half the proceeds of the dairy, and thus embarrass or defeat defendant in enforcing his *lien*, and securing his accounts against the Taggarts, &c., and that it was void as against defendant. The plaintiff also claimed that said John G. Taggart, before the death of his father, Jonathan, had bought said Jonathan's interest in the farm; but the referees found from the evidence, that said John G. owned only one-fourth of the cheese, subject to the agreement with defendant for the lien. It also appeared that the defendant was the administrator of Jonathan Taggart's estate.

The County Court, September Term, 1852,—POLAND J., presiding,—rendered judgment on the report of the referees for the defendant.

Exceptions by plaintiff.

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Geo. F. Edmunds for plaintiff.

Peck & Bailey for defendant.

The opinion of the court was delivered by

REDFIELD, Ch. J. We are here presented with another variation of the many changes, which seem to be present in the litigation between these parties, in regard to the letting of this farm. This plaintiff seeks to recover of the defendant one-fourth part of the amount for which he sold a quantity of cheese raised on the farm. The contract provides, in terms, that "neither party shall sell the cheese, without the consent of the other." Accordingly both parties had agreed to send this cheese to a house in New York, for sale, and had put it into the hands of the carrier for that purpose, under a consignment to this house. And from the report, and the conduct of Taggart, we suppose the money for this sale was expected to come into Briggs' hands, as indemnity for what the Taggarts owed him, and to be accounted for on settlement, else we do not comprehend Taggart's entering into this arrangement with plaintiff, by which he now seeks to recover the money of defendant, and which arrangement the referees say "was not a sale, nor a mortgage, nor a pledge *bona fide* made between them; but a contrivance entered into between them, to enable Taggart, without Briggs' knowledge, to obtain pay for half the proceeds of the dairy, and thus to embarrass or defeat Briggs in enforcing his lien and securing his accounts against the Taggarts." We suppose from this, that John G. Taggart expected Briggs, on the sale in New York, to receive the money, and to account for it on settlement of this whole dealing, else why would Taggart's obtaining the money by this contrivance embarrass defendant in securing his accounts; John G. Taggart, then, had assented to Briggs' having a lien on the cheese, and to his retaining the money. And the referees do not say that they found this assent of John upon the admissions of the father, and to suppose they did would be very absurd, since John seems to have acquiesced in defendant's lien, long after his father's death, up to the very time of depositing the cheese with the carrier on the consignment. The referees say expressly that the admissions of Jonathan T. were admitted, because defendant claimed one-fourth of the property from Jona-

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than Taggart, and that the admissions were merely, that Briggs had a lien, not any admission or declaration that John had assented to any such arrangement. This must have been found by other and independent evidence. So that we do not very well see how these admissions could have affected plaintiff's title to John's fourth of the money. And we suppose he does not expect to recover beyond that, although his arrangement with John G. Taggart, which the referees characterize as a contrivance to embarrass defendant, extended to one-half the cheese. Briggs owning one-half clearly in his own right, being administrator of Jonathan Taggart, which would give him, in any event, the control of one-fourth, and having a lien upon John G. Taggart's share, by his consent, it seems to us very obvious, that the plaintiff's contrivance to embarrass and defeat him in these rights, would have been altogether void, as to him, if it had been so far perfected by change of possession, as to be binding upon others claiming prior perfected liens upon the property.

II. But there was evidently no sufficient change of possession. Going to the property after it had been put into the custody of the carrier, and looking at it, and saying, I deliver this to you, without notifying the agent of the carrier, that any change had been made in the ownership or in the consignors, is no change of possession, and could have had no effect upon Briggs, if the contract had been altogether *bona fide*. But as it was, it could in no sense receive the favorable consideration of any tribunal. But we have endeavored to make the most of it for the plaintiff, and that is little. We think the plaintiff acquired no right, by this transaction to recover the money from defendant.

Judgment affirmed.

McDonald & Mills v. Eggleston, Barker & Co.

JOHN McDONALD & THOMAS MILLS v. W. EGGLESTON, B. BARKER, H. V. B. BARKER, & S. R. HAIGHT.

Partnership. Power of one to bind the firm by deed. How the instrument may be proved, so as to bind the firm, when so executed.

Instruments under seal may be executed for many purposes by one partner, which will be binding on the firm.

But instruments executed in that manner, in the absence of other partners, will be binding on the firm, only in transactions that transfer an interest.

A mere partnership relation will not authorize one partner to execute an instrument under seal, whereby a new, and original obligation is created, which will be binding on the partnership, as a specialty debt, or which can be enforced by the action of covenant.

But an instrument of this character, and executed in this manner, may be rendered obligatory by a previous parol authority, or by a subsequent parol ratification, and would in either event become the deed of the company; and much slighter acts will produce that effect, where the subject matter of the agreement is within their partnership dealings, than where it has no connection with the business of the firm.

And parol testimony is admissible to prove, that the instrument is the deed of the firm, and became such by the signature of one partner, in the name of the firm, by showing a previous authority for that purpose resting in parol, or that they were present at the time, or subsequently ratified the same either expressly or impliedly, and this implication may be drawn from the conduct of the partners, or the course of dealing by the firm.

And where the evidence, though resting in parol, tends to prove this in whole or part, it should go to the jury as tending to prove the execution of the instrument.

ACTION of covenant. Plea, *non est factum*, and trial by jury.

On trial the plaintiffs introduced the following deed: "Articles of agreement made this 16th day of May, A. D. 1846, by and between John McDonald and Thomas Mills of the one part, and Eggleston, Barker & Co. of the second part: Witnesseth, That for and in consideration of the payments and covenants herein after mentioned to be made and performed by said parties of the second part, the said parties of the first part do hereby promise and agree to execute, construct and finish in every respect, in the most substantial and workman-like manner, and to the satisfaction and acceptance of the engineer of the Vermont Central

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" Railroad Company, the grading and masonry of the Vermont
" Central Railroad, on sections No. one and two of the first divis-
" ion, now under charge of Beckwith, engineer. And the said
" grading and mason work shall be made and completed as describ-
" ed in the following specifications, on or before the first day of Ju-
" ly, A. D. 1847."

[Here follow the printed specifications, &c.]

The contract then proceeds in writing :

" It is understood and agreed, that payment shall be made to the
" parties of the first part, at such times only as payments are re-
" ceived for estimates made upon said work.

" This contract shall take effect and be in full force from and af-
" ter the 25th day of May instant, it being understood that all
" work done and estimated up to the said 25th instant, is to be
" paid for and settled agreeably to a former contract entered into
" between the parties of the second part and Samuel R. and Hen-
" ry A. Brown, on the third day of January, 1846.

" In witness whereof we have hereunto set our hands and seals
" this 16th day of May, A. D. 1846."

(Signed,)

" EGGLESTON, BARKER & Co.

by B. BARKER," (Seal)

" JOHN McDONALD," (Seal)

" THOMAS MILLS." (Seal)

To prove the execution of this deed, the plaintiffs introduced, as
a witness, one Leemis Palmer, who testified that William Eggleston,
Benajah Barker, Henry V. B. Barker and Storm R. Haight, the
defendants, were partners, that they took a contract of S. F. Belknap
in the fall of 1845, to make the Central Railroad from the mouth of
Dog River west to Lake Champlain, that they commenced business
in the winter after, and that the witness was employed by them, as
clerk and cashier, and had the management of their account books
and money concerns, received of said Belknap the money on the
monthly estimates, and paid out the same from December, 1845, to
August, 1846, and kept the accounts, contracts and papers of the
firm at his office in Montpelier. That the Barkers, Haight, and
witness came to Burlington, on the 25th day of May, 1846, for the
purpose of sub-letting sections 1 and 2, to the plaintiffs; that they
were negotiating until the 26th day of May, when the terms of the
contract were agreed upon, and the witness

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filled out the paper produced, at the American Hotel in said Burlington; and that B. Barker signed the same for the firm in the presence of the witness, but that he did not see the other signatures put to the said paper, it being done afterwards. That H. V. B. Barker and S. R. Haight were about the house, and that witness has no doubt they knew the contract was signed, but that he does not know that they were in the room when B. Barker signed the paper.

That there was a duplicate of the paper made, which the witness took and kept in his office in Montpelier; that defendants, H. V. B. Barker and Haight never had much to do about the office. That it was the custom of witness, when he filled out a contract to put seals to it. That defendant, Eggleston, resided in Albany, New York, and that witness never saw him in Vermont, but once or twice; once in the fore part, and once in the latter part of July, 1846; that there was some difficulty, and witness wrote to him to come, and he came to Montpelier, and with witness and one or two of the other partners looked over the concerns of the company, and witness made such explanations as were required of him.

That the duplicate paper or contract was among the papers, at the office in Montpelier, at the time of this looking over by the defendants; and that after looking over, defendants then present, with witness, came down the line of the Railroad to Burlington.

That the plaintiffs went to work on sections one and two, and believes defendants went on to those sections, when they came down the road to Burlington; that witness received the money paid by said Belknap for the work done by plaintiffs under the contract, and paid the plaintiffs. That witness made the form of the contract, and submitted it to said Haight and B. Barker, and then caused it to be printed; and that the other contracts made by the defendants sub-letting the work, were generally in the same form and signed by B. Barker, in the same way as this. That witness made out a statement of all the concerns of the company up to the first of July, 1846, thinks it was after Eggleston was at Burlington, and that he sent one of them to Eggleston, but does not know that he ever received it, does not know that Eggleston ever took any active part in conducting the business of the company, except as before stated.

The counsel for the plaintiffs informed the court that they had

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put in all their testimony in support of the general issue on their part.

The counsel for defendants insisted, that there was no legal evidence tending to prove that the paper produced was the joint deed of the defendants.

The court, March Term, 1853,—PIERPOINT, J., presiding,—so decided, and directed the jury to return a verdict that the writing was not the deed of the defendants. To this decision and direction to the jury, the plaintiffs excepted.

Underwood & Hard and *W. W. Peck* for plaintiffs.

I. When a contract is within the ordinary scope of a partnership, or relating to its affairs, and there are no statutory regulations on the subject, a partner may execute it under seal for and in the name of his firm, and his authority be by parol, provided it is specially given for the purpose. The proof of the authority may be express or implied, and may be antecedent consent or ratification.

The rule that the power must be under seal, is purely technical and embarrassing to commercial relations, and therefore is not applicable to partnerships. Coke Lit. 231. Case in year books, stated in *Cady v. Shepherd*, 11 Pick. 400. Lovelace's case W. Jones R. 268, stated in *Ball v. Dunsterville*, 4 T. R. 313. *Britton v. Burton*, 1 Chit. 707. *U. S. v. Astley et al.*, 8 Wash. 510, 511. 4 Wash. C. C. 471. *Halsey et al. v. Whitney et al.*, 4 Mason 231-2. *Ludlow v. Simonds et al.*, 2 Cains' Cas. affirming the doctrine in *Ball v. Dunsterville*, and in Lovelace's case. *Mackay v. Bloodgood*, 9 Johns. 285. *Randall v. Van Vetchen*, 19 Johns. 60. *Skinner v. Dayton*, 19 Johns. 513. *Smith v. Kerr*, 3 Comst. 144. *Greene v. Seton*, 1 Hall, 262. *VanDusen v. B—*, 18 Pick. 229. *Swan v. Stedman*, 4 Met. 548. *Fitchorn v. Boyer*, 3 Watts 159. *Bond v. Aitkin*, 6 Watts & S. 165. Story on Part. § 120, 122. 3 Kent's Com. 47-8. Coll. on Part. § 465, 467.

II. Upon the principle of all the cases, the parol authority suffices, if it specially embraces the contract in question. If it consists in subsequent consent it is immaterial whether it rests upon actual knowledge of the execution of the contract, or reasonable belief that the contract has been so executed.

Upon the authority of *Greene v. Seton*, the authority may be general, especially for that mode of execution, provided it be addi-

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tional to the authority conferred by the partnership itself, and is devisable in like manner. In either of these views the evidence in this case tended to show a special *parol* authority to execute under seal.

Phelps & Chittenden for defendants.

Eggleston did not execute the contract declared on, nor authorize its execution by his partners.

A partner cannot bind his firm, by executing a sealed instrument in their name, unless the others are present and assenting, or have given previous authority by deed. *Ball v. Dunsterville*, 4 Term R. 313. *Harrison v. Jackson*, 7 Term R. 207. *Williams v. Walsby*, 4 Esp. Rep. 220. 3 Eng. Com. Law 54. 1 Montague on Partnership 42. *Mackay v. Bloodgood*, 9 Johns. 285. *McBride v. Hagar*, 1 Wend. 826, 834, 337. *Blood v. Goodrich*, 9 Wend. 68. Same Case, 12 Wend. 525.

And where a subsequent *parol* ratification by the absent partner, is held effectual, it binds him as upon a *parol* execution of the contract only, and does not render him liable, in an action of covenant. He is held to adopt the contract and not the seal. *White v. Caylor*, 6 Term 176. *Bank of Columbia v. Patterson*, 7 Cranch 299. *Randall v. Van Vechten*, 19 Johns. 60. *Skinner v. Dayton*, 19 Johns. 513. *Evans v. Wells*, 22 Wend. 840. *Lawrence v. Taylor*, 5 Hill 113. *Worrell v. Mann*, 1 Selden 229. *Damon v. Grandy*, 2 Pick. 852. This principle is well settled and rests upon obvious and forcible reasons. It cannot be departed from with safety, and can never work injustice.

There are some American cases, where the subsequent *parol* ratification is held an adoption of the seal and sufficient to render the party liable in covenant. These cases are opposed to the current of authorities, and cannot be sustained upon principle. Most of them, however, are distinguishable from the present case.

But even these cases, (as do all which treat a subsequent ratification as effectual for any purpose,) hold that the adoption of the contract by the partner sought to be charged, must be distinct, unequivocal and upon full knowledge; and were probably induced by very strong instances of such recognition and assent.

In the present case the evidence has not the least tendency to

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show that Eggleston ever knew of the existence of the contract, and much less that he ever adopted it, or ratified it as his own.

It is not pretended that the statement made out by Palmer, even if it ever reached Eggleston, contained any allusion to this contract or the manner of its execution.

The opinion of the court was delivered by

ISHAM, J. This action is in covenant. The questions in the case arise under the plea of *non est factum*, which puts in issue the execution of the instrument on which the action is brought. The agreement was signed and sealed, in the name of Eggleston, Barker & Co., by B. Barker, one of the firm. It is insisted that he had no authority as a partner to execute the instrument in that manner; that it is not binding on those partners, who were absent at the time, and who had not previously assented to its execution; and that no testimony was introduced, tending to show a subsequent ratification of its execution, by the absent members of the firm, sufficient to render it their deed.

We learn from the case that the defendants were the persons composing the firm of Eggleston, Barker & Co., and that in the fall of 1845, they contracted with Mr. Belknap to construct the Vermont Central Railroad, from the mouth of Dog River to Lake Champlain. The first and second sections of the road were afterwards sub-let by the defendants to the plaintiffs, for construction. It is obvious, therefore, that the subject matter of this agreement, on the part of the defendants, was within the scope of their partnership business, and that this agreement was made, to carry into effect the object for which their relation as partners was formed, and to insure, to that extent, the performance of that contract, which they were under obligations with Mr. Belknap to execute. It is unquestionably necessary for the plaintiffs to show those facts, which will render this instrument the deed of all the defendants; otherwise this joint action of covenant cannot be sustained.

At common law, one partner could not charge the firm, by deed, with a debt or other obligation, even in commercial dealings, without a prior authority, under seal, for that purpose. Neither could such an instrument be subsequently ratified, so as to make it the deed of the company, except by an instrument, under seal.

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Harrison v. Jackson, 7 Term 207. Holt N. P. C. 141. Smith's Mer. Law 68. 1 Amer. Lead. Cas. 446 note. The reason for this rule is founded on principles of English law, which do not exist in this state; that such a power would enable one partner to give a favorite creditor a lien on the real estate of the partners, and, consequently, a preference over the simple contract creditors of the firm. Though this reason for that rule does not exist in this state, the general principle has been, and is recognized and sustained. The strictness of this rule, however, has been greatly relaxed, to suit the exigencies of partnerships, and commercial associations, and by later authorities in England, and in this country, instruments under seal may be executed for many purposes by one partner, which will be binding on the firm. Thus one partner may release, under seal, an obligation or debt due the firm; 1 Wend. 326. 7 N.Hamp. 550. Or execute a power of attorney, under seal, to another, for that purpose. *Wells v. Evans* 20 Wend. 251. S. C. 22 Wend. 325. It has been held "that when a seal is not essential to the nature of the contract, and will not change or vary the liability, the addition of a seal will not vitiate it; and when an act is done, which one partner may do without deed, it is not less effectual, that it is done by deed." On this subject Justice Story has remarked, Story on Part. § 122, "that in cases where the contract would have been binding, if made without a deed, there does not seem to be any solid reason why the act, when done, should be vitiated by being under the signature and seal of the firm." That this agreement would have been obligatory if it had been executed as a simple contract, and not under seal, there can be no doubt, for it was made to advance their partnership interests, and in the benefits derived from it they have participated.

We think, however, that principle does not apply to a case of this character. The doctrine seems to be established that an instrument executed in that manner, in the absence of other partners, will be binding on the firm, only in transactions that transfer an interest. Thus in *Milton v. Masher*, 7 Met. 244, it was held that a mortgage of personal property need not be under seal, and that a mortgage of that character is not vitiated, by one partner affixing a seal to the instrument. The same principle is sustained in 1 Met. 515. 2 Stewart 280. 1 Amer. Lead. Cas. 447, and

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cases cited. The rule, however, is of long standing, and fully sustained by the authorities, that a mere *partnership relation will not* authorize one partner to execute an instrument, *under seal*, whereby a *new and original obligation is created* which will be binding on the company, as a specialty debt, or which can be enforced by the action of covenant. If the case, therefore, is made to rest on the circumstances which took place at the time the instrument was signed by B. Barker, we do not see how it can be sustained as the deed of all the defendants. (We have no doubt, however, that an instrument of this character, executed in this manner, may be rendered obligatory by a previous parol authority, or by a subsequent parol ratification; and in either event, the instrument will become the deed of the company; and that much slighter acts will produce that effect, where the subject matter of the agreement is within their partnership dealings, than it will, where it has no connection with the business of the firm, and from which they are to derive no benefit. In the case of *Ball v. Dunsterville*, 4 Term 313, it was held that if the partners were all present, when one of their number signed the instrument in the partnership name, and affixed thereto a seal, it became the deed of all. The authority for the execution of that deed was not under seal, but rested in parol; that is, parol testimony was admitted to prove the presence of the partners at the time of its execution, and that circumstance was treated, not only as an adoption of the signature, but of the seal, so as to render it the deed of the firm, upon which covenant was sustained. If parol testimony is admissible to prove an authority from that source, it is equally so to prove other circumstances, showing their assent to such an execution of the instrument. The actual presence of all the partners may perhaps afford more satisfactory evidence of their assent, than other circumstances which may exist; but that affects, simply, the credibility of the testimony, not its competency. If parol testimony is admissible in one case, it is in the other. If a power of attorney under seal, can be dispensed with in one instance, it may in the other, also. This view of the subject is taken by WILDE, J., in *Cady v. Shepherd*, 11 Pick. 405 in which he remarks "that in the "case of *Ball v. Dunsterville*, importance was attached to the circumstance, that both partners were present when the deed was "executed; and it may be important, as being the most satisfac-

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"tory proof of the assent of the non-subscribing partner; but in no other respect does it appear to be material."

If a previous authority, resting in parol, will render the instrument binding on the firm, as a deed, it follows that a subsequent ratification of the instrument may be proved by circumstances resting in parol; for no greater authority is requisite to ratify an instrument, than is required to execute it. The power that can create, can legally ratify.) This conclusion has been drawn and sustained wherever the case of *Ball v. Dunsterville* has been recognized and adopted, particularly by the courts in this country. Chancellor Kent, 3 Kent's Com. 51, has reviewed the cases on this subject both in England and this country, and he observes, "that an absent partner may be bound by a deed executed on behalf of the firm by his copartner, provided there be either a previous parol authority, or a subsequent parol adoption of the act; and that such ratification amounts in judgment of law, to an execution of the deed by all the partners, though executed by one only." The ratification does not make a verbal or simple contract merely, for it is an adoption by the party of the signature and seal affixed to the name of the firm. In Collyer's Treatise on Partnerships § 467, it is said "that the American cases have gone farther than those in England in relaxing the former strictness of the law, and that it is well settled in the United States, that an absent partner may be bound by a deed executed on behalf of a firm by his copartner, provided there be either a parol authority, or a subsequent parol adoption of the act." (The rule is also sustained in 1 Amer. Lead. Cas. 446, in which it is remarked "that it is settled, after a thorough investigation of the cases, that a partner may bind his copartner by an agreement under seal, in the name of the firm, provided the copartner assents to the contract, previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol, and need not be express and special, but may be implied from the conduct of the other partner, or the course of dealing by the firm." *Swan v. Stedman*, 4 Met. 548. *Bond v. Aitken*, 6 Watts & Serg. 165. *Pike v. Bacon* 21 Maine 280. *Parst v. Roth*, 4 Wash. 471. 1 Brack. 462, by Marshall, Ch. J. (We are satisfied, that parol evidence is admissible, to prove that this instrument is the deed of the defendants, and became such by the

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X signature of one partner, in the name of the firm, by showing a previous authority for that purpose, resting in parol, or that they were present at the time, or subsequently ratified the same, either expressly or impliedly, and that this implication may be drawn from the conduct of the partners, or the course of dealing by the firm.

The court directed a verdict for the defendants, thereby treating the evidence introduced as having no tendency to show a subsequent ratification of the instrument, and as being incompetent to be taken into consideration by the jury. In relation to H. V. B. Barker, and Mr. Haight, both of whom, it appears from the case, were about the house at the time the instrument was executed, and who came there for that purpose, there can be no doubt, that those circumstances should go to the jury as evidence of their assent to its execution; as to them, the case in its facts seems to fall within that of *Ball v. Dunsterville*. In relation to Mr. Eggleston, the remaining partner, more difficulty exists. It does not appear that he had ever been in that vicinity previous to July, 1846, about two months after this instrument was executed. In consequence of some difficulties in the affairs of the company, he was sent for, and came to the office of the company at Montpelier on that account. On that occasion, he was led to the examination of the affairs of the company, its liabilities and resources; to the examination of the money which was received from Mr. Belknap, under their contract, and to its expenditure by them in the construction of the road. As these plaintiffs were then employed in constructing their part of the road, and naturally would be entitled to the amount due them on the monthly estimates, it is not unreasonable to conclude that Mr. Eggleston, in seeing to the expenditures of the company, became informed of the contract made with the plaintiffs for the construction of those sections of the road. The duplicate of this instrument was among the papers in the office. After that examination they went to Burlington, on the line of the road, and on the sections where the plaintiffs were at work. A statement of the affairs of the company was sent to him by mail, soon after his return to Albany, and the legal presumption is, that it was received. It is true, that all this may exist, and he not know that this contract was executed by deed; yet, they are very consistent with his examination of that agreement, and his knowl-

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edge of its provisions. The question now is, not whether the testimony is sufficient, but whether those circumstances have a tendency to show such knowledge, and that no objections were made to its execution in that form. Of this the jury are to judge, and draw their own conclusions. If those circumstances have such a tendency, they should not have been taken from the consideration of the jury. We think the plaintiffs were entitled to have that testimony submitted to the jury, as having a legal tendency, in proof of the issue formed in the case.

The judgment of the County Court must be reversed, and the case remanded.

UDNEY H. PENNIMAN AND THOMAS MILLS v. WILLIAM B.
MUNSON AND LEMUEL B. PLATT.

[IN CHANCERY.]

Where A. B. C. and D. entered into a contract or mutual agreement, to purchase a certain patent, and by the terms of the contract, they were each to pay but one-fourth of the amount paid for the patent, and all were to share in making that payment, so that one should pay no more than the other; and C. and D., by an arrangement with the vendor of the patent, paid little or nothing, but the sum actually paid was taken from A. and B., they at the time supposing, that they were paying no more than C. and D., *it was held*, that this was fraudulent upon A. and B., and that upon an accounting in relation to this matter, A. and B. should charge C. and D. with an equal proportion of the money, which they had paid, so that in the purchase of said patent, both C. and D. shall pay as much for their interest in the same, as A. and B. pay for their interest in said patent.

It was also *held*, that though the mere act, of conveying to each of the parties an undivided interest in the patent so purchased by A. B. C. and D., did not create among them the relation of partners, yet, when they, after that purchase was made, agreed to convert their separate rights into a common interest, for the purpose of selling the patent, and agreed to divide the net proceeds equally between them, a partnership was created, and such a relation then existed, that each had the right to call the others to account for the avails they respectively had received.

APPEAL from the court of chancery. The orators set forth in their bill; that in September, 1841, the said Thomas Mills, one of

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the orators, purchased a certain patent right, or the exclusive right under a certain patent, to make, use and vend a certain stump machine, within the town of Colchester. That afterwards the said Mills and said Udney H. Penniman, and one William B. Munson, of said Colchester, agreed mutually to buy the exclusive right under said patent for the residue of the county of Chittenden, each to pay one equal proportion of said purchase money, and to become equally interested in said purchase, and to share equally in the profits or loss if any; and that said Mills was to convey one equal undivided third of his interest in said patent, for the town of Colchester, to said Penniman and Munson, and all to share equally in the gain or loss, and said Penniman and Munson each to pay to said Mills one-third of what he paid therefor, and that Mills did so convey as agreed.

That thereupon they negotiated with one Ormsbee, agent of the owners of said patent, for the same, for the County of Chittenden, which trade or purchase was mainly negotiated by said Munson for himself and said Mills and Penniman; and that, as the orators supposed, the said purchase was made of said Ormsbee for \$600, and that the orators paid \$200 each, and supposed said Munson was to pay the other \$200, as represented by said Munson and Ormsbee; and that said Ormsbee conveyed said patent to the orators and said Munson, to each an equal and undivided part.

That said Munson intending to defraud the orators, agreed with said Ormsbee, at the time of the said purchase, secretly, and without the knowledge of the orators, that the sum actually to be paid him should be only \$400, and that it should be represented to the orators that the sum to be paid should be \$600; and that the \$200 to be paid by said Munson should be given in, and not be paid by said Munson; and that each of the orators did pay \$200, and said Munson paid nothing in fact.

That in October, 1841, the orators and said Munson agreed with one Lemuel B. Platt, that he should be let in as a partner, to be equally interested with orators and said Munson, by paying to each of the others one fourth of the whole purchase price, said Munson representing the price for said county of Chittenden, to be \$600. That said Platt came in and orators and said Munson so conveyed, and said Platt became jointly interested with the orators and said Munson.

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That afterwards said Munson represented, that he had purchased the right, for the county of Franklin, of said Ormsbee for \$700, and that his purchase should be for the benefit of said four partners, and thereby induced the orators and said Platt, to accept a deed of said patent for said county of Franklin, and each to pay him one-fourth of the price of \$700; and that orators each did pay one-fourth of said sum; and that believing the representations of said Munson, the orators took said conveyance, and paid their proportion of said sum of \$700, upon the representations of said Munson that he was giving the partnership the full benefit of his said purchase.

That said representations were false and fraudulent, and that said Munson paid only \$275, for said county of Franklin, and that this sum was only to be paid in the event that said Munson sold and conveyed the same, if not to be deeded back, as agreed between said Ormsbee and Munson.

That afterwards the said partners bargained for said patent for the residue of the State of Vermont, and that the trade was mainly negotiated by said Munson, but in connection with the other partners, and said Ormsbee; and that he agreed to pay therefor the sum of \$900, as the orators then believed and supposed; and that again said Munson, although he urged the other three to buy the same, yet he again made a secret agreement with said Ormsbee, that neither he nor said Platt should pay anything towards said purchase; but all should take the deed and share equally in the profits and property, and the orators each pay one-fourth of \$900, and in fact said Munson on behalf of all the parties agreed with said Ormsbee to pay but \$450 for said purchase, and to induce said Platt to enter into said purchase, said Munson agreed with said Platt that he should pay nothing, and that to carry out said fraud on the orators, and to compel them to pay the whole price, said Munson falsely represented said purchase to be \$900; and that on the faith of said representation the orators each paid one-fourth of \$900 to said Ormsbee for said purchase, and said deed was taken to the said Penniman, Mills, Munson and Platt jointly, for which the orators paid the whole price, and said Munson and Platt paid no part thereof.

That said partners made said purchases, and went on and sold rights under said patent, through said territory, for several years,

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the said Mills making said sales under an agreement with the others that he should receive one-fourth of the proceeds for his services, and that the residue should be equally divided between said Penniman, Mills, Munson and Platt, and received large sums of money, and various kinds of property for such sales, the said Munson and Platt receiving each their proportion, the orators not knowing of the collusion and fraud, and that they had paid the whole price as aforesaid.

Prayer, that an accounting may be had of all the matters, contracts and dealings touching or concerning said patent right, and all matters relating to said partnership, and that said Munson and Platt be decreed to pay to the orators their just proportion of the purchase price of said patent, &c.

The defendants answered, and testimony was taken, which tended to prove substantially the facts to be, as set forth in the orators' bill.

March Term, 1853, Chancellor PIERPOINT, upon hearing the cause upon the record and the evidence, adjudged, that the orators are entitled to treat the defendants as equal partners with themselves, in all the transactions set forth in the bill, and that the defendants are bound to share equally with the orators in the original actual costs and expenses of the property purchased, and in the profits and losses sustained.

That the representations, by which the orators were induced to enter into the contract, were fraudulent; and that the agreements, with Ormsbee and with each other, under which the defendants avoided the actual payment of their share of the original purchase money of the property, were a fraud upon the orators, &c. And that the cause be referred to a special master, &c.

From this decree the defendants appealed.

Phelps & Whittenden for orators.

Underwood & Hard for defendant, Platt.

C. Adams for defendant, Munson.

The opinion of the court was delivered by
ISHAM, J. There can be no doubt that under the contract between

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each of the plaintiffs and defendants in this case, a joint interest was obtained in the patent, which was referred to in the bill. That interest was created by the several conveyances of that patent, which were made to, and between these parties, embracing in the first place, the county of Chittenden, afterwards the county of Franklin, and subsequently the residue of this state. Under those conveyances, each of the parties held an equal undivided fourth part of the whole interest in that patent, over that territory. It is quite immaterial whether Munson, in negotiating the sale and purchase of that patent right, acted as the agent of Messrs. Penniman, Mills and Platt, or whether he was acting only in behalf of the owner of the patent, as the result shows that the conveyances vested the interest in this patent, over that territory, in these four persons. The object of this bill is simply to carry into effect the agreement of these parties, which was to take effect, after their joint interest had become perfected. It is obvious, however, that the purchase of the patent from the owner or his agent, was principally transacted by Mr. Munson, and that the plaintiffs, as well as Mr. Platt, were each induced to become purchasers of one-fourth of that interest, under a mutual agreement entered into with them by Munson, that they all were to become the exclusive owners of the patent right for that territory, and that each were to pay one-fourth of the purchase money, so that the expenditure made for the purchase of the patent, should be borne by them in equal proportions.

The conviction cannot be easily overcome, that Munson gave to each of the parties who made that purchase, assurances that they should pay for their interest, no more than he had paid for the same, to the agent or owner of the patent. It also satisfactorily appears from the testimony in the case, that the several, but undivided interests of all these parties were to be made, and held as a joint or common stock, for the purpose of selling and disposing of the same on joint account, and that the net proceeds, arising from the sales, were to be equally divided between them.

It is not pretended that Munson has paid any part of the purchase money, for the interest he holds in that patent; at the same time, he has received considerable sums of money from the plaintiffs, who are jointly interested with him, which they have paid for their interest in the patent. The same is true in relation to Mr.

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Platt. He has paid little, if anything for the interest he holds. The notes he gave for the purchase money, were re-delivered by Mr. Munson, on the detection of the frauds practiced on him by Mr. Munson ; and he still holds that interest, and claims his share of the proceeds arising from the sales under the patent.

Mr. Platt, in this transaction, stands in no more favorable light than Mr. Munson, for after his notes had been re-delivered to him, he suffered the negotiation to proceed with the plaintiffs, and consummated a contract, by which an additional sum of money was taken from them for the same patent over an enlarged territory. The conduct of both Munson and Platt was fraudulent, as it respects the plaintiffs ; for they have obtained from them, almost, if not the entire amount of the whole purchase money for the patent, when under their contract, they were each to pay but one-fourth of that amount, and all were to share equally in making that payment, so that one should pay no more than the other. It is proper, therefore, whenever an accounting takes place between these parties in relation to this matter, that the plaintiffs should charge the defendants with an equal proportion of the money, which they have paid for the purchase of that patent, so that both Munson and Platt shall pay as much for their interest, as was paid by the plaintiffs for theirs. This was their agreement, and the inducement by which the plaintiffs became purchasers of the patent.

It is probable, that the mere act of conveying to them undivided interests in the patent, did not create among them the relation of partners, for individuals may have a joint interest in property, and still not be partners ; but when, after that purchase was made, they agreed to convert their separate rights into a common interest, for the purpose of selling the same, and to divide the net proceeds equally between them, there can be no doubt, that a partnership was thereby created, or such a relation formed, that each has the right to call the others to account, for the avails they respectively have received. The bill states the facts from which the law creates that relation between them, and under this proceeding their agreement will be enforced, as decreed by the chancellor, that the orators and the defendants shall share equally in the original expenditure, for the purchase of the patent right, and in the net profits and losses on its resale, by either or all of them.

Upon the principles stated by the chancellor, the master has

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made his report, to which there are no exceptions. We perceive that the master has allowed the sum of \$150,00 as paid for the town of Colchester, when from the evidence we think but \$100,00 was paid. That correction should be made. The case will therefore be remanded to the chancellor, to correct the decree accordingly. Its effect will be to deduct three-fourths of the difference between the two sums, with the interest from the claim allowed to Mills, and add the same in equal proportions to the amount due the others. In all other respects, the decree of the chancellor is affirmed.

COTTON FLETCHER v. MORTON COLE.

[DECIDED DECEMBER TERM, 1852.]

Attachment. Evidence. Charge to the Jury, &c.

Where an officer attached and removed a quantity of lumber, and in his return, as regarded the lumber, set forth that, "also on the same 4th day of September, 1847, I attached about 6000 feet of pine lumber," &c.; it was held, after judgment in the suit upon which the lumber was attached, that the return, with such reasonable intendment, as the court is bound to make, must be regarded as sufficient to create a *lien*, though the return might not have been good upon a plea in abatement.

And where it appeared that the lumber so attached, was in a mill yard, which belonged to a third person, and that the officer, upon making the attachment, moved the lumber from one to four rods; this removal was held sufficient to constitute an attachment, or to make the officer liable to the debtor for the property, after the creditor's *lien* was gone.

If it appear that the charge of the court below to the jury, under the state of evidence, was all that was important to a correct understanding of the law applicable to the facts, this court will not reverse the judgment, even where there is technical error, if such error had no direct bearing upon the case.

A witness, who was discharged of all interest, at the time of the hearing, is admissible, notwithstanding that he was directly interested up to the time of trial, and that the discharge was made with the expectation of his becoming a witness. *Moore v. Rich*, 12 Vt. 563.

One *tortfeasor* may always recover against a subsequent *tortfeasor*, who shows no right whatever.

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The assignment of the property attached, by the debtor to the creditor, in discharge of his judgment, will not defeat the liability of the officer for the property, and being liable over, he will recover the full amount of one who wrongfully takes the property.

TRESPASS for a lot of pine boards. Plea, the general issue, and trial by jury.

On trial the plaintiff offered in evidence a copy of an attachment, and judgment, and execution thereon, issued by the Chittenden County Court, September Term, 1848, in favor of Edwards & White, against one Myers.

The plaintiff also offered evidence tending to prove that he was in November, 1848, constable of Colchester; that plaintiff attached the lumber in September 1847, and that after he had so attached it, the defendant sold the same to one Ford, who took the lumber, and converted it to his own use.

It also appeared on trial, that the lumber had been owned by the defendant; that he drew the logs into the mill at Winoski Falls in March, 1847, which was then carried on by one Travesy, and that the logs were sawed out by him.

The question raised was, whether the boards had been sold and delivered to Myers by the defendant, Cole, so as to subject them to attachment as the property of said Myers; and whether said Fletcher, the plaintiff, had made a valid attachment of the same.

The plaintiff offered testimony tending to show, that after he had attached the lumber, he procured it to be removed to another place in the same mill-yard, from one to four rods from where it lay when attached. That in March, 1847, the defendant and said Myers went to the saw mill where the logs lay, and selected certain logs, out of which said Myers was to have some lumber, and that a chalk mark was put upon the logs; and that they then agreed, that Myers should have the lumber sawed from those logs, at the mill measure, at \$19 per thousand, and defendant directed the sawyer to saw said logs as Myers should direct, at his, defendant's expense.

The defendant offered testimony tending to prove that he told said Myers, at the time they were at said mill, that the lumber should not be delivered to him unless he paid for it. It also appeared, that the lumber was sawed out by Travesy, as defendant had directed, about the last of March, or the fore part of April,

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1847, and that while said Travesy was sawing it, said Myers, in the absence of defendant, and without consulting him, moved a part of the lumber about six or eight rods from the mill, and piled it up in the open space about said mill, saying to said Travesy and one Talcott, who was employed about the mill by the defendant in getting the logs into the mill, that he would not take the lumber at the mill measure, and at the time sent word to that effect, by said Travesy and Talcott to defendant; and that defendant, the next morning after receiving such word from said Myers, caused Myers to be notified that he (Myers) could not have the lumber at any price.

That previous to defendants receiving word that Myers would not receive the lumber at the mill measure, he sent by his clerk a bill for the lumber to Myers, and demanded payment thereof, and Myers refused to pay.

The defendant insisted and requested the court to charge the jury, that the description of the lumber and its location in the officer's return in the writ, in favor of Edwards & White, was too vague and uncertain to create any lien or valid attachment. (The description in the return was, "and also on the said fourth day of September, I attached about 6000 feet of pine lumber.") That in order to have the removal by Myers operate as a delivery to vest the property in him, it must have been done with an intention on the part of Myers to accept it at the mill measure, and if anything remained to be done to ascertain the quantity, the property did not vest in Myers; and that if it was the intention of Myers at the time he removed it, to have it measured before he accepted it, no property was vested in him by such removal.

That if the jury should find that the contract was, that Myers should not have the lumber till paid for, or if the jury did not find that anything was agreed upon, as to the time of payment, the removal by Myers before the payment, was tortious, and no property thereby vested in Myers.

That as the property was conceded to have been the defendant's, it was incumbent on the plaintiff to show a complete sale and delivery to Myers, and that there must be a possession taken by Myers, with the knowledge and consent of defendant.

That if the jury should find that Myers objected to receiving it at the measure at which defendant claimed he should receive it,

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and the parties never came to an agreement on this point, after the lumber was removed, no property vested in Myers, and that it was competent for defendant, if the lumber was not sold in the log, but was to be measured, and delivered after measure, to object to the delivery of the lumber, even though Myers claimed the lumber according to the contract, and that in this event no property passed, or if the jury should find that the contract was rescinded, the plaintiff could not recover. That as the property had not been charged in execution, the plaintiff could not recover, but if he could at all, it would be a recovery of nominal damages merely.

The court refused so to charge the jury.

The plaintiff on the trial, offered the said Myers as a witness, it appearing that the damages and costs in the suit of Edwards & White, on which the lumber was attached, had been paid and discharged, and Myers wholly released therefrom, and the whole attachment on which this suit is predicated, was discharged, and said Myers had sold and transferred all his interest to said Edwards & White, as appeared by written release and assignment produced on trial.

The defendant objected to the admission of said Myers as a witness. The court overruled the objection and admitted the witness; and his testimony tended to prove that the defendant, after the lumber was removed by said Myers from the mill, called on said Myers, and received from him an order on one Chamberlain, Strong & Co. for \$100, in part payment for said lumber, that at the time said Myers objected to paying for the lumber, because it was not measured, that defendant told said Myers, there need be no trouble about the measure, that when Myers stocked it up, he might get any one to measure it; and that said Myers did afterwards measure the lumber with one Chase, and that there was about 5100 feet, and that at the time said Myers and defendant made the contract for the lumber, there was nothing said about the time of payment.

The court,—PIERPOINT, J., presiding,—instructed the jury that if they found the plaintiff attached the lumber, and the defendant sold it to Ford, and it was taken by him, the plaintiff was entitled to recover, unless at the time of the attachment, the lumber was the property of the defendant. That if defendant, (being owner of

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the logs,) agreed to have them sawed into such stuff as Myers should request and let him have the lumber at a stipulated price, upon the payment of such price, it would not be such an agreement as would authorize Myers to take the lumber, without payment of the price to Cole ; but the lumber would remain the property of Cole, although Myers took possession of it without the consent of Cole.

But if Cole consented that Myers might take the lumber under the contract, without paying down the price, or consented that Myers might keep the lumber, after having taken it without payment, and received the order in part payment, the title of the lumber would therefore vest in Myers, and his creditors had a right to attach it.

The jury returned a verdict for the plaintiff.

To the several decisions of the court, and to the charge to the jury, and neglect to charge as requested, the defendant excepted.

Geo. F. Bailey and *D. A. Smalley* for defendant.

I. The attachment in this case in favor of Edwards & White against Myers, was too vague and uncertain to create any lien on the lumber in question.

The pretended removal of from one to four rods does not appear to have been previous to the time the defendant sold it to Ford ; and it does not appear that any copy was left with or for the defendant Myers, according to the statute.

II. The court should have charged the jury, as requested, that if there was a price, but no time of payment stipulated, the law implies that the payment should be made, before or at the time of taking the property.

But the fair inference from the charge is, that Myers had a right to take the lumber, unless it was expressly stipulated that it should be paid for in advance.

III. Myers was directly interested to have his debt paid to Edwards & White out of defendant's property.

The only claim the plaintiff has to recover, is on account of the lien created by the attachment and its present existence. If the release discharges the interest of Myers, it also releases and discharges the judgment rendered in the suit on which the attachment was made.

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This suit, therefore, cannot now be maintained, and judgment must be for the defendant.

B. Rixford and Wires & Peck for plaintiff.

1. Myers was properly admitted to testify. He was not incompetent on the ground of interest; that was removed by the discharge from Edwards & White, and the assignment to them. He was not incompetent on the ground of policy. If policy presents an objection, it is because he was the real plaintiff. The real plaintiff was the plaintiff of record. It was his duty to prosecute the suit, to protect himself. But regarding him as the real plaintiff, this has not been treated, in this state, as a ground of exclusion. *Seymour v. Beach*, 4 Vt. 498. *Moore v. Rich*, 12 Vt. 568. *Boardman v. Rogers et al.*, 17 Vt. 589. *Edwards v. Golding et al.*, 20 Vt. 30. *Sylvester, Exr. v. Downer*, 20 Vt. 355. *Blake v. Buchanan*, 22 Vt. 548. *Sanborn v. Kittredge*, 20 Vt. 632.

2. The charge was correct. It put the case to the jury upon the effect of a removal of the lumber by Myers, without having complied with the contract; also upon the effect of a subsequent acquiescence by defendant, in the removal as a delivery, or a subsequent change by the parties of the contract.

3. The court properly declined to charge, as requested. The request assumed that the court should take from the jury the consideration of the evidence respecting a change in the contract, and acquiescence after the removal.

4. The court properly declined to comply with the request to charge that the officer's return did not show an attachment of the lumber. The description in the return is sufficient, and that is a compliance with the act. But the objection cannot be raised by a trespasser.

5. If the plaintiff was entitled to recover at all, he was entitled to recover full damage, and hence the request to charge, that, if entitled to recover it was only to recover nominal damages, was properly rejected.

The opinion of the court was delivered by

REDFIELD, CH. J. 1. We think the return of the attachment must be regarded, as sufficient to create a lien. The return of the service might not have been good upon a plea in abatement, but

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the judgment would be good until reversed in some way, and the return, with such reasonable intendments, as we are bound to make, in such cases, must be regarded as sufficient, we think. The removal was no doubt all, that would be necessary to constitute an attachment, or to make the officer liable to the debtor for the property, after the creditor's lien was gone. And whether the defendant had made a formal delivery of the same property to a subsequent purchaser intervening the attachment and the removal by the officer, could be of no possible importance to the validity of the attachment, if Myers' title had vested, as such interference then by defendant was the mere intrusion of a wrong doer, and of no avail whatever, in regard to plaintiff's title; and if Myers' title was not made out, the plaintiff had no title whatever, and so the jury were told.

2. The omission to charge the jury, in regard to the right of Myers, in case nothing was said, in regard to his taking possession, would be technically error, if there was any possible reason to suppose any such state of facts could have been found by the jury; but as neither party claimed any such state of facts, the thing is highly improbable, on the face of the case, upon any such presumption, although it is obvious such a finding by the jury is supposable, and it is somewhat to be regretted, that cases should be drawn up so defectively. But this is done in such haste, and so imperfectly often, that we are compelled sometimes to make very strong presumptions to save reversing cases upon points, which had no bearing whatever upon the case, as it actually appeared in the court below; and which would so appear, if the case were fully stated, and we no doubt reverse cases upon grounds, which do not exist in the case, but only in the bill of exceptions. We are reluctant to do this.

It is here obviously a mere oversight in drawing up the case, or if the omission actually occurred in the charge, it was forgetfulness, from the fact of its having no probable bearing upon the case. The obvious meaning of the charge is, that if you find the facts as the testimony on the part of the plaintiff tends to prove, no title vested in Myers; but if you believe the facts testified by Myers, that would be sufficient to give him a title. The idea, that the jury should have believed what Myers testifies, as to nothing being said as to payment, and disbelieve all his other testimony,

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is so improbable, that we are disposed to take the other view of the case, that the charge, under the state of the evidence was all that was important to a correct understanding of the law applicable to the facts.

3. We think the papers in the case show a release of Myers' interest. It seems to be the very case of *Moore v. Rich*, 12 Vt. 563, in principle. The event of the suit could not affect Myers.

4. It does not seem important, whether the property was charged in execution, or not, as the judgment having been released, would of course destroy the lien, and the only ground of recovery now, is the plaintiff's liability to the debtor, Myers. We see no reason to doubt this. There is no doubt the plaintiff sufficiently interfered with the property, and the assignment of this claim to the creditors, in discharge of their judgment cannot defeat the liability of plaintiff, and being liable over, he must recover the full amount.

5. If the plaintiff was a mere *tort feasor*, in taking possession of the property, and Myers had released him, so that he was not liable over to any one, he could still recover of any one, who interfered with the property, by mere wrong. It is well settled that one *tort feasor* may always recover against a subsequent *tort feasor*, who shows no right whatever.

Judgment affirmed.

NOTE.—To warrant this court in reversing the judgment of the county court, and sending a case to a new trial, there should be something more, than the mere possibility, that the jury have been misled. There should be a reasonable probability, at least. In a complication of written requests to be responded to in the hurry of a jury trial, all that could be expected of the judge would be, to charge upon the hypothesis of each party, and not to select broken views made up of fragments of testimony, on both sides, unless that view is presented in a *separate and distinct request*, which is not the case here.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF FRANKLIN,
JANUARY TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

GEORGE HILL v. WILLIAM H. MOREY.

*Trespass Qua. Clau. Motion to Dismiss. Master and Servant.
Charge to the Jury.*

An objection, founded upon the want of the proper minute of the time of issuing the writ, to be made by the authority signing the same, as required by the statute, must be made at the first term of court to which the writ is returnable, and before pleading to the merits, and if not so made it will be out of time.

The plea of not guilty, in an action of trespass, is regarded, as waiver of all dilatory defences.

Where A., although as a volunteer, undertakes to assist B. in performing a certain piece of work, and is suffered to proceed without objection, B. being at the time

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present, they will stand in the relation of master and servant; and the acts of A. being done for the benefit of B., if A. while thus engaged, should negligently, or for the want of proper information, commit a trespass, B. will be liable for the same.

A license cannot be proved under the general issue, in an action of *trespass quare clausum fregit*, in defence to the suit; but to be available it must be pleaded.

THIS was an action of *trespass* founded on the statute entitled, "An act more effectually to prevent trespass in certain cases," passed in 1849.

Plea not guilty, and trial by jury. After the jury were empaneled, the defendant made a motion, in writing, that the cause be dismissed, on the ground, "that the plaintiff, when he prayed out his writ, did not cause a true minute of the day, month, and year when said writ was signed, or any minute whatever to be made on said writ."

The court decided, that if such certificate was necessary, the defendant was too late in making his motion; and overruled the same.

It appeared on trial, that the plaintiff and defendant were adjoining land owners, the plaintiff owning upon the east, and the defendant upon the west; and that originally, the line between them was marked upon the land, and corners made at the north and south ends of the line; but the marked trees towards the north part of the line, had been mostly cut down, and the fence, (a brush fence,) was not on the line, some parts being on the one side and some on the other. That the parties went upon the ground for the purpose of ascertaining where the line was, and of dividing and repairing the fence between them; and that one Sturdevant was also there at the time. They went to the north part of the line where the marked trees were gone, and where the trespass was said to have been committed, and the plaintiff went to a certain point in the woods, either at or near the north end of the line, and told the defendant, who was some fifteen rods distant, that it was the corner. Whether the plaintiff went to the true corner or not, did not distinctly appear; the testimony of the plaintiff tending to show that he did go to the true corner; and the testimony of defendant tending to show that he did not, but that plaintiff was a short distance east of it. The parties made, at this time, a division of their fence,

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the defendant taking the said north part for his share of the fence; and he then began to repair the brush fence. The defendant also offered testimony tending to show, that the said Sturdevant, who was a neighbor, and happened to be present, without any request from the defendant, began to assist the defendant in repairing the said brush fence. That in so doing, said Sturdevant cut a few small trees and poles east of the division fence and east of the line between plaintiff and defendant; and this cutting by said Sturdevant, was the trespass complained of. It also appeared from defendant's testimony, that at the time said Sturdevant began to cut, the defendant told him, that he must be careful and not cut over the line. The line, a portion of the way, was in dispute on the trial. It appeared that the defendant in repairing the fence, went on the west side, and said Sturdevant on the east side, and in this way passed over the whole of that part of the division, which defendant was to repair, each cutting on his side of the fence small trees and poles, and putting the same on the fence, and thus repairing it. The defendant claimed, and so said Sturdevant testified, that Sturdevant in what he did, in cutting and repairing the fence, was a mere volunteer, and that he did not act at the request of the defendant, and that he was not in the employ of the defendant. The defendant therefore claimed that he was not liable for Sturdevant's acts; and that as he requested Sturdevant not to cut over the line on plaintiff's land, Sturdevant in so doing, acted against the wishes and without the authority of defendant, and that no assent could be inferred or implied from the defendant's presence and knowledge of the acts being done.

Defendant also claimed, that if the jury found that the plaintiff, when he pointed out the north corner, pointed it out as further east than the true corner, it amounted to a license; and that if defendant or Sturdevant did not cut further east than the line would have been, assuming the corner thus pointed out by plaintiff to be the true corner, it amounted to a license, and that defendant would not be liable.

Plaintiff's testimony tended to prove, that he, the plaintiff, told them before they began to mend said fence, not to cut on his side of the fence. It also appeared, that where said fence run it was wood land, but that the land east of the fence was enclosed with the plaintiff's cleared land, and occupied by plaintiff; and that the

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land west of said fence was enclosed with defendant's cleared land, and occupied by and in defendant's possession. On the points above stated, and made by defendant, the court,—PECK, J., presiding,—charged the jury as follows:

That in order to entitle the plaintiff to recover, the jury must find, that some cutting was done or trespass committed east of the division fence and east of the division line between the plaintiff's and defendant's land; that for any cutting or trespass west of the true line, although east of the division fence, the plaintiff could not recover for want of title to the premises where such trespass was committed; and that for any cutting done or trespass committed east of the true line, if west of the division fence, the plaintiff could not recover, for want of possession, and by reason of the defendant being in possession of the land west of and up to the division fence; but for any cutting done, or trespass committed by defendant, which was both east of the division fence, and east of the division line between plaintiff and defendant, if done on plaintiff's land, or land in plaintiff's possession, the defendant would be liable. On the point made in relation to defendant's liability for the acts done by Sturdevant, the court charged the jury, that if Sturdevant was cutting for defendant's benefit and in his presence, and with his knowledge and consent, the act of Sturdevant would be the act of defendant, for which defendant would be liable, even if Sturdevant had not been employed by defendant, and defendant did not advise or direct such act to be done; or if defendant knew at the time when Sturdevant was cutting and did not object, but assented to it, and it was an act beneficial to defendant, and done for defendant's benefit, the defendant would be liable for such act of Sturdevant; and that the question, whether what was done by Sturdevant was done by the consent of defendant or not, was a question of fact for the jury to find; and that they might or might not find such consent of the defendant, as they might think the evidence warranted; that if they did not find such assent, or that the cutting or trespass by Sturdevant, was not done by defendant's assent, the defendant would not be liable for the acts of Sturdevant; but if Sturdevant was cutting for defendant's benefit, and his acts were beneficial to defendant, and he was cutting by defendant's assent, even if defendant told him not to cut over the line on plaintiff's land, yet, if Sturdevant, by mistake, not knowing and not

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having the means of knowing where the line was, cut over the line on plaintiff's land and possession, such act of Sturdevant would be the act of defendant; but if Sturdevant was cutting even with defendant's consent or direction, and knowingly or wilfully without defendant's consent or direction cut over on plaintiff's land or possession, the defendant would not be liable for such act.

In reference to what was claimed, as to a license, the court told the jury, that even if they should find that plaintiff pointed out the corner further east than the true corner, and that defendant and Sturdevant did not either of them cut further east than the line would be, assuming the corner thus pointed out to be the true corner, if such evidence had a tendency to prove a license, it would not be a defence under the general issue, that in order for defendant to avail himself of that evidence, as a license, it should have been pleaded; but that such evidence was proper for the jury to consider and weigh, in reference to the question of fact, where the true line was, and in that point of view, it had a tendency to show that the true line was further east, than the line claimed by the plaintiff on trial.

To the decision of the court overruling the motion to dismiss, and to the omission of the court to charge as requested, and to the charge as given, the defendant excepted.

The jury returned a verdict for plaintiff.

A. Burt and A. O. Aldis for defendant,

Insisted, that the motion to dismiss ought not to have been treated as a dilatory plea. That the decisions in cases called analogous, are founded upon the phrase in the statute, shall on motion "*abate*."

The learned counsel also urged with ability, and great ingenuity, the points made in the trial of the case below. The points sufficiently appear in the statement of the case.

H. R. Beardsley for plaintiff,

Insisted, that the decision of the court below, overruling the motion to dismiss, was fully sustained in *Pollard v. Wilder*, 17 Vt. 48, and *Wheelock v. Sears*, 19 Vt. 559. The counsel for plaintiff, also, discussed with ability and at length, the points made in the trial of the case below; and insisted that the rule in *Trespass Qua.*

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Clau., was, that if defendant would justify the entry, on the ground of license, he must plead it.

The opinion of the court was delivered by

REDFIELD, CH. J. I. The first objection taken in this case, by way of motion to dismiss, on the ground, that no proper minute of the time of issuing the writ, was made by the authority signing the same, coming, as it did, only at the time of trial by the jury, has been more than once decided, by this court, to be out of time. *Wheelock v. Sears*, 19 Vt. 559. *Pollard v. Wilder*, 17 Vt. 48. The plea of not guilty, is regarded, as a waiver of all dilatory defences, and this, under the present statute, is so regarded; such defences must be presented at the first term, and before pleading to the merits.

II. The other objection depends a good deal upon the construction of the testimony. It is a small cause and seems to have been pretty thoroughly tried, in the county court, and we have not been able to see very clearly any error in the trial. Sturdevant, although a volunteer, seems to have undertaken the office of a servant to the defendant *pro hac vice*, and to have been suffered to proceed in his service, without objection, or any other restriction, except to be careful not to cut trees standing upon the plaintiff's land; but he did cut trees on the plaintiff's land, negligently, and for want of proper information, and upon every principle of the relation of master and servant, the defendant must be regarded, as liable for the act. If one could always excuse himself from liability for the acts of his servant, by giving such instructions, the liability would be reduced to cases of express assent. And in the present case, the act being done, in the presence of the defendant and for his benefit, and he not dissenting, in any manner, must be regarded, as assenting. As the evidence stood, there could be no reasonable doubt of defendant's liability for the acts of Sturdevant, upon either of these grounds, and we think, the case was correctly submitted to the jury, upon both grounds.

III. The other point made is certainly presented, with a commendable degree of ingenuity, but we cannot perceive that it amounts to anything more, than testimony having some supposable tendency to show, that the plaintiff might himself have misled the defendant, as to the exact location of the dividing line between

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them. If this were so, the parties would thus for the time, be laboring under a mutual mistake. The most we could make out of this is a license to the defendant, to occupy the land, as his own. It would not make it so, unless the occupation continued fifteen years. The permission would be revocable, at any time, upon the plaintiff's discovering the mistake. What is this then more than a license to defendant, to do all the acts he does do, until the license is revoked? It is true these acts are not trespasses, but lawful acts. But in order to have that so appear, it must be proved, for in the law, *de non apparentibus, et non existentibus eadem est ratio*. And to be proved it must come in under the proper issue. And as a license cannot be shown under the general issue, and no other issue is formed in this case, it is the same, as if no such proof existed, or was offered. We do not perceive how this case differs from what it would be, if the plaintiff in terms had given permission to do the act complained of, and in that case confessedly no defence could be made under the general issue.

Judgment affirmed.

ANSON BUCK v. CURTIS B. ALBEE.

Contract. Illegality. Sale of Spiritous Liquors.

In all cases where the contract grows immediately out of, or is connected with an illegal act, so that it becomes necessary to prove the illegal act, to enable the plaintiff to recover, then the contract is so far connected with the illegal act, that there can be no recovery on the contract.

But if the contract be so far unconnected with the illegal act, as to be founded upon a new consideration, it may be enforced.

Judicial tribunals will not lend their aid to enforce an illegal contract, or a contract growing out of an illegal act, but will leave the parties in the situation where they placed themselves.

And where the plaintiff, with others, was interested in a quantity of spiritous liquor, which was placed, by a mutual arrangement between the parties, in the hands of the defendant to sell, and he sold the same, in violation of the license law of 1846, and the plaintiff derived his title, to a portion of the

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money received by the defendant upon such sale, through that arrangement or contract, and it also being necessary for the plaintiff, in order to sustain his action, to prove the arrangement under which the liquor went into the hands of the defendant, and the illegal sale itself, *it was held*, that the contract was so connected with the illegal sale of the liquor, that the plaintiff could not recover any portion of the money received upon such sale, by the defendant.

ASSUMPSIT. The declaration contained four counts. 1. *For work and labor.* 2. *Goods sold and delivered.* 3. *Money lent &c.* 4. *Money had and received.*

Plea, the general issue, and trial by jury.

It appeared from the evidence of the plaintiff on trial, that one Michael Kirk, of Fairfield, was the owner of a quantity of spirituous liquors, which were at Burlington, and Essex or Colchester; that being indebted to the defendant, on the second day of February, 1850, he transferred the liquors to the defendant, upon an agreement that the defendant should sell the same, and apply the avails, first to pay the debt, which said Kirk owed the defendant, secondly to pay the balance to Barlow & Keyes, or to their order, said Kirk owing Barlow & Keyes about sixty dollars, and they agreeing to hold the balance for the use of Kirk.

Immediately after making this agreement, said Kirk, and Albee, the defendant, went where the liquors were stored, and said Kirk delivered the same to the defendant, who soon after transported them to said Fairfield.

It also appeared, that the plaintiff, Buck, had become and then was surety for the said Kirk, to the amount of \$500; and that the day after the liquors were delivered to defendant, as aforesaid, the plaintiff, defendant, Kirk and Barlow, of the said firm of Barlow & Keyes, met at Fairfield, and it was then agreed between them, they all being present and agreeing thereto, that the defendant should sell the said liquors, collect and apply the avails to pay the debt said Kirk owed defendant, of about \$100, also to pay all the expense defendant might incur for the freight and sale of the said liquors, and all his trouble in the matter; and after that pay, first, the debt to said Barlow & Keyes, and then the balance to the plaintiff to indemnify him for being surety for said Kirk, as aforesaid.

This agreement was wholly verbal, and the part of the agree-

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ment which provided for paying the debt due Barlow & Keyes, was rescinded, it having been otherwise paid.

The testimony tended to prove that defendant, during the summer, sold the said liquors at Fairfield, in this state, to the amount of \$600 or \$700, and the proof tended to show that he received the money therefor.

There was no evidence tending to show, that the defendant had any license to sell said spiritous liquors. It also appeared, that at the time of the agreement, and at the time this suit was brought, the plaintiff was merely a surety for said Kirk, and that he had not paid any part of the debt for which he was surety, and that said Kirk had never paid any of it; but the plaintiff, since the suit was brought, had taken up the notes signed by himself and Kirk, and given his own note for the debt.

The defendant insisted and requested the court so to charge: 1. That the contract between Kirk, Albee and Buck, being for the sale of spiritous liquors in violation of the law, was founded upon an illegal consideration, and proposed an illegal object, and itself was illegal, and could not be enforced against Albee by Buck. 2. That it was an agreement on the part of Albee, to pay the debt of another, and void under the statute of frauds, it not being in writing. 3. That the agreement between the parties was executory, and therefore the plaintiff could not recover on the count, for money had and received. 4. That there was no evidence tending to show any demand upon Albee, by any one, for the balance of the avails of the liquor, and that without such demand no action would lie. 5. That Buck could not recover, he not having actually paid the debts on which he was surety, before bringing this action.

The court declined to charge as requested, but did charge the jury, that if they found that Albee agreed with Buck and Kirk to sell the said liquors, and pay over to Buck the balance of the avails that might be in his hands after first paying his, (Albee's) debt and expenses and for his trouble, and that defendant had received the money therefor before this suit was commenced, that plaintiff would be entitled to recover such balance, (if any) in this action, for money had and received; and that plaintiff could recover such balance, although Albee sold the liquors in violation of law and



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without a license, and although Kirk and Buck expected he would so sell them, when they entered into the agreement with him.

That the agreement was not within the statute of frauds. That the count for money had and received would lie, for the plaintiff to recover such balance, (if any,) in the hands of Albee; and that no demand was necessary upon Albee to sustain this suit, if Albee had received the money for the liquors, a reasonable time before the suit was brought, for Albee to have made the payment to Buck; and that plaintiff could recover such balance, though he had not paid any part of the debts upon which he was liable as surety for said Kirk when this action was commenced, if Kirk had not paid it, and plaintiff was still liable.

The court further told the jury, that there was no evidence tending to support any count in the declaration, except the count for money had and received, and that if plaintiff recovered he could not recover an amount greater than the sum for which he was holden for said Kirk, at the time of the agreement, and for which plaintiff had either paid, or was still holden, and that if Albee had not sold and received the money for the liquors when the suit was commenced, the plaintiff could not recover.

The jury returned a verdict for the plaintiff.

To the charge as given, and to the omission of the court to charge as requested, the defendant excepted.

————— for defendant.

I. The court below erred in charging the jury, that if they found the agreement as claimed by the plaintiff, and that defendant had sold and received the money for the liquors, before the commencement of the suit, that plaintiff would be entitled to recover, although the defendant sold the liquors in violation of law, and without a license, and although the plaintiff and Kirk expected defendant would so sell them, at the time they entered into the agreement with him. *Booth v. Hodgson*, 6 Term 405. *Mitchel et al. v. Cockburn*, H. B. 379. *Hawson v. Hancock*, 8 Term. 557. *Cannon v. Boyce*, 3 B. & A. 179. *Loughton et al. v. Hughes et al.*, 1 M. & S. 598. *Wilkinson v. Loudensack*, 3 M. & S. 117-126. *Bowry v. Bennett*, 1 Camp. 848. *Territt v. Bartlett*, 21 Vt. 184. *Smith et al. v. Allen et al.*, 23 Vt. 298. 2

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Starkie on Ev. 7 Amer. Ed. 96, 1218. Chit. on Cont. 657, 658 and 659, and authorities there cited.

II. That the agreement, upon which plaintiff founds his right of recovery, having for its object the sale of the liquors in violation of law, is illegal and tainted with moral turpitude; that the plaintiff is *particeps criminis*, and the court will not lend their aid in furtherance of this illegal transaction.

III. That if any part of the entire consideration, or any branch or part of the matters promised, be in violation of law, no action will lie; for in such a case the law will not lend its aid to either party. *In pari delicto melior conditio defendantis*. Cro., J. 103. 2 Starkie on Ev. 63 and note.

IV. That when money or other property is advanced or furnished to effectuate an illegal purpose, and is so applied, no case is found where the *particeps criminis* has been allowed to recover for the avails of the illegal transaction. 8 Term 577, above cited. 1 M. & S. 594. 2 Starkie on Ev. 78.

V. The law will not raise an implied promise in favor of a *particeps criminis*. *Mitchell v. Cockburn*, above cited. *Sullivan v. Greaves*, in Park on Ins. 8. *Cannon v. Boyce*, 3 B. & A. 179.

H. R. Beardsley for plaintiff.

There can be no doubt, on general principles that by the arrangements reported in the bill of exceptions, the plaintiff would be justly and legally entitled to the monies realized by the defendant from the sale of the liquors; and that the defendant, upon principles of equity and good conscience cannot withhold them from the plaintiff.

But the defendant contends, that he is shielded and protected in the violation of these moral obligations, by the statute law of this state, limiting and regulating the traffic in spiritous liquors. It now remains to be seen whether that law, under the circumstances of this case, will aid the defendant in his attempt to cheat the plaintiff out of a just and honest claim.

I. The first knowledge or connection of the plaintiff with the liquors, was after they had been transferred by Kirk, the owner, to the defendant, for the purpose of sale, with an agreement between them to apply the avails in a particular way then specified; after this sale and delivery, the terms and conditions

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thereof were only so far varied, as to give the plaintiff a right to the money when realized in lieu of other persons.

In this was there any violation of the law by the plaintiff? Is he to be treated as standing in *pari delicto*? We think not.

II. When did the plaintiff's right first accrue? Not until the money was received by and in defendant's hands. The plaintiff had no right in the property itself, he could neither compel nor prevent a sale. The defendant was wholly independent of the plaintiff, and not subject to his direction or control, nor in any way liable to the plaintiff till he received the money.

Hence, whether the sale of the liquors, by the defendant, was in violation of the statute or not, it can in no way affect the right of the plaintiff to the money, after it had been received by the defendant.

III. If then the plaintiff is to be defeated in his action, it must be upon the ground that the consideration for defendant's promise set up in the declaration is tainted with illegality.

Now what was the consideration for defendant's promise? Clearly not the delivery of the property by Kirk to him for the purpose of sale—not anything which passed from plaintiff to defendant of any interest in, or claim upon said property, for he had none; but the consideration for defendant's promise, grew out of the single act of receiving the money. Can there be any doubt but that this is a legal consideration?

Although the transaction might be illegal as between Kirk and defendant, does it follow that Kirk's creditors, for whose benefit Kirk and the defendant entered into the arrangement, must fall under the same condemnation? We insist not.

IV. The plaintiff cannot be defeated of his right to the money, without proof that he had knowledge that defendant had no license, and did not intend to procure one, but intended to sell the liquors without a license. Without this, what has plaintiff done to forfeit his right to the money? But assuming the plaintiff did know that defendant had no license, how he is to be affected by that? He could not prevent a sale of the property by the defendant, nor could he compel him to get a license.

The defendant's turpitude in endeavoring to cheat the plaintiff out of his honest rights, is only equalled by the ingenuity of his counsel in providing the necessary instruments of attack.

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The opinion of the court was delivered by

ISHAM, J. The fact is found in this case, that one Michael Kirk was the owner of a quantity of spiritous liquor, and that on the second day of February, 1850, he transferred the same to the defendant to be sold. Its avails were to be applied to pay the debt due from Mr. Kirk to Mr. Albee, then the claim due Messrs. Barlow & Keyes, and the surplus was to be held subject to the order of Mr. Kirk.

The contract, under which the plaintiff claims the money for which this suit is brought, was made the next day after the transfer of the liquor to the defendant, and while it was in his hands. The plaintiff and defendant, Mr. Kirk and Mr. Barlow were present and parties to that arrangement; in which it was agreed, that the defendant should proceed and sell the liquor, and apply the avails in payment of the debts before mentioned, and the balance was to be paid to the plaintiff on the claim for which he was liable as surety for Mr. Kirk. This arrangement gave the plaintiff an interest in the liquor before its sale, as much so, as that of the other parties to that contract. The liquor was afterwards sold under that arrangement, and the money was received by the defendant. The question arises, whether this was a contract of that illegal character, which will prevent the plaintiff from recovering the money received by the defendant on that sale.

The sale of the liquor by the defendant was made without license; and by the act of 1846, which was in force at that time, the sale was obviously illegal and void. If a suit had been brought against the purchaser of the liquor for the price, it could not have been sustained; for the law will not lend its aid to enforce such a contract, but will leave the parties in the situation in which they have placed themselves. In 2 Kent's Com. 588, the rule is given, "That if the contract grows immediately out of, or is connected with an illegal act, a court of justice will not enforce it. But if it be unconnected with the illegal act, and founded on a new consideration, it may be enforced." In the application of this rule it may be observed, that in all cases, where it is necessary to prove that illegal contract and sale, to enable the plaintiff to recover, then the contract is so connected with the illegal act that a recovery cannot be had. But if the right can be established without such proof, the plaintiff may recover; for the claim is unconnect-

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ed with the sale, and rests on a new consideration. In Story on Cont. 146, it is said, "That if an act, in violation of either statute or common law, *be already committed*, and a subsequent agreement be entered into, which though founded thereupon, constituted no part of the *original inducement*, or *consideration therefor*, such an agreement is valid." If the money arising from the sale of this liquor had been received by the defendant, and the plaintiff had afterwards obtained an order for the payment of the same to him, and the defendant had agreed to pay it, the action could be sustained; as the plaintiff in no sense, would be a party to the illegal contract of sale. The knowledge that the money in the defendant's hands arose from an illegal transaction, would make no difference; for, in such case, it would be sufficient to prove the money in his hands, and the agreement to pay the same to the plaintiff, without showing the contract or arrangement under which the defendant received it. It is said in Story on Cont. 146-7, "That this rule, and the distinction which is made, will be found to form the principle which lies at the root of many apparent contradictory cases, and to offer the best solution to the various and opposing decisions." *Armstrong v. Tober*, 11 Wheat. 258.

It is expressly stated in the case, that before the liquor was sold, and while it was in the defendant's hands, the plaintiff and the other parties in interest agreed, that the defendant should proceed and sell the liquor. When the defendant was selling it, he was not only acting for his own interest, but for the plaintiff, and the other party also. The plaintiff as much directed the sale, as the others, who were equally interested with him, and was as directly concerned in the violation of the statute, as was the defendant himself. To sustain this action, it will be necessary for the plaintiff to prove the contract under which the liquor came into the defendant's hands; the mutual arrangement for the sale of it; the illegal sale itself; and the receipt of the money by the defendant. It is through that contract and sale, that the plaintiff derives his title. If the plaintiff is allowed to recover, it is not upon a mere receipt of the money by the defendant, and a subsequent agreement to pay the same to the plaintiff; for, no such subsequent agreement has been made; but it must rest upon a direct adjudication of the court, sustaining that illegal contract and sale. The court can no more enforce that contract, or see to the distribution of the proceeds of

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that sale between these parties, than they can enforce any illegal contract, or see to the distribution of money between parties, which has arisen from any other illegal adventure. The remarks of Justice BALDWIN, in the case of *Batte v. Coleman*, 4 Peters 184, are appropriate and emphatic. "If either has sustained a loss by the bad faith of the *particeps criminis*, it is but a just infliction for premeditated fraud. He must not expect, that a judicial tribunal will exert its powers, to shift the loss from one to another, or to equalize the benefits or burthens, which may have resulted from the violation of every principle of morals, and of law."

The charge of the court, therefore, we think was incorrect in saying "that if the defendant agreed with the plaintiff and Mr. Kirk to sell the liquor, and pay the balance to the plaintiff, after paying his own claims and the debt due to Barlow & Keyes, that the plaintiff would be entitled to recover, although the defendant sold the liquor in violation of law, and without a license, and although it was expected by the plaintiff and Mr. Kirk, that he would so sell the same, when they entered into the agreement with him." This charge will enable the plaintiff to recover, and reap the benefit of a sale made by his procurement and directions, and in direct violation of the statute. The law will sustain no such action.

The judgment must be reversed, and the case remanded.

 ANDREW W. BARTON v. JOHN A. LEARNED.

Forcible Entry and Detainer. Jurisdiction given to a single magistrate by the Statute of 1850. (Comp. Stat. 307 and 308.)
To whom the action is given and against whom.

In the action under the statute, for forcible entry and detainer, giving summary process to get possession of land, since the statute of 1850, (Comp. Stat. 307 and 308) a single magistrate has jurisdiction.

And this action, under the statute, is given not only against the *lessee*, who holds over after the lease is determined, but also against any person, holding under the *lessee*; and any person, who is entitled to the possession of the land, can sustain the action.

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And where the defendant, in 1851, conveyed certain premises to B. and became a tenant to B., at will or sufferance, by a parol agreement, and was to surrender possession, when requested, either to B. or his grantee, and B. deeded to P., and P. deeded to the plaintiff, and all three requested the defendant, within the year, to surrender the premises to the plaintiff, which the defendant refused to do; *it was held*, that the plaintiff could maintain this action against the defendant for the possession of the premises.

It was also held, that after notice to surrender the premises, the defendant's right as lessee was determined, and that the defendant was estopped from setting up an adverse right to B. or his grantee.

In New York, under a similar statute, *it was held*, that the purchaser of the premises from the landlord might have this remedy. *Birdsall v. Phillips*, 17 Wend. 473.

THIS was an action under the statute, brought in October, 1852, before a justice of the peace, to recover possession of lot No. 32, first division, in Berkshire, drawn to the right of the college, and came to the county court by appeal.

The plaintiff offered to prove that on the 23d day of August, 1851, the defendant, while in possession of the premises, deeded the said lot No. 32, to one Charles Bowker, and at the time verbally agreed with said Bowker, that he, the defendant, would quit and give up the possession of the said land to the said Bowker, or to any one that Bowker might sell to, any time on demand, and that he, the defendant, would not require any length of notice to quit, but would quit the possession any day when requested. The plaintiff also offered to prove, that within one year from said 23d day of August, 1851, the said Charles Bowker deeded said land to Seneca Paige, and said Paige to the plaintiff, all in due form of law; that the defendant, after Paige took his deed and before he deeded to plaintiff, acknowledged that he held possession under Paige; but that soon after the plaintiff bought and took a deed of the lot from Paige, the defendant claimed to own the land, and to hold the same in his own right. That the plaintiff soon after he purchased the land from Paige, and within a year from said August, 1851, called on the defendant, and requested him to quit and give up the possession of the lot to him, the plaintiff. That the defendant refused to quit the possession, and claimed to own the lot; that within the year, as aforesaid, the said Paige, Bowker and the plaintiff, all requested the defendant to give up possession of the lot to the plaintiff; but the defendant wholly refused to

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quit possession, and claimed title to himself of the lot; and that the defendant remained in possession of the lot till the commencement of this suit, claiming to own the lot, and wholly denying the title of the plaintiff, and that defendant is still in possession of the lot, claiming to own the same.

The defendant objected to all the foregoing evidence of the plaintiff, and the County Court,—PECK, J., presiding,—excluded the same, and ordered a verdict for defendant, and rendered judgment thereon for the defendant.

To this decision of the court the plaintiff excepted.

A. O. Aldis and J. Rand for plaintiff.

I. The extent of the jurisdiction of a justice of the peace, is determined by statute. By the statute of 1797, actions of trespass upon the freehold and where the title of land was concerned, were excepted from their jurisdiction.

By the statute of 1824, they were authorized to try "trespass on the freehold, except real and possessory actions, where the sum in demand does not exceed twenty dollars."

By the Revised Stat. of 1840, and the Comp. Stat. of 1850, the words, "except real and possessory actions," which were used in the act of 1824, are omitted.

II. The special jurisdiction of the tribunal created by the statute, relating to forcible entries and detainers, was not in conflict with the law, as to the jurisdiction of justices. The justice of the peace alone had no jurisdiction, a judge of the county court being associated with him, thus making a special and peculiar court for a peculiar object.

In forcible *entries* it is plain it must mean, the person turned out. In forcible *detainers* does it mean solely the lessor? 1. No—for there may be peaceable entry without right, and wrongful and forcible detainer, and no relation ever existing of lessor and lessee. In such a case how can the complainant recover except by showing title? See Slade's Comp. Chap. 21 § 6. Comp. Stat. 806 § 13. 2. Again, when an action was brought on the statute, there the defendant might show superior title and recover. This under the English statute, 8 Hen. 6. See Jac. L. D., title Forcible Entry, &c. It was not so on indictment, there the force is the question solely to be tried. *State v. Nelson*, 13 Johns. 340,

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and with this agrees the ruling in New York. *Johnson v. Stansbury*, 9 Wend. 201. *Ives v. Ives*, 13 Johns. 235. *Hyatt v. Wood*, 4 Johns. 150.

But on the indictment, the complainant must show sufficient title to bring himself within the statute, and that he is not a mere tenant at will; and the respondent may disprove, if he can, that the complainant has such title. *State v. Learned*, 11 Johns. 509. *State v. Nelson*, 13 Johns. 340. Hence under the statute, as to forcible entry and detainer, the title of land is concerned, and tried, and "*the person entitled to possession*," means what it would in trespass or ejectment.

III. The statutes of 1842 and 1850, have some analogy to the statutes of forcible entry and detainer, and are called "additions" to it. But their real object was different. It was to furnish a summary process, by which those entitled to possession of lands or houses leased, could more easily and cheaply get possession of the premises leased. 1st. It gives a single justice jurisdiction. 2d. It simplifies the form of proceeding, making the declaration and proceedings very simple and plain. 3d. There is no fine, no action for treble damages. 4th. This statute applies only to leases by writing or parol, or those holding under them, and such persons only can be made defendants. 5th. But as to the plaintiff, he must be "*the person entitled to possession*." The remedy is not confined to "*the lessor*." If intended to have been so confined the word "*lessor*" would have been used.

The transfer of the right to possession, by death and operation of law, may as well be questioned, as the transfer by deed of the party. An administrator may bring an action for forcible entry &c. *Allen, admr. v. Ormsby*, 1 Tyler 845. *Edmunds v. Morrill*, Brayton 20.

In New York, under a similar statute the purchaser of the premises from the landlord may institute these summary proceedings against the tenant. *Birdsall v. Philips*, 17 Wend. 464-473. So in Massachusetts, *Hollis v. Pool*, 3 Met. 850. *Benedict v. Morse*, 10 Met. 228. *Kingsley v. Ames*, 2 Met. 29. *Hildreth v. Conant*, 10 Met. 298. *Saunders v. Robinson*, 5 Met. 343.

A. Burt for defendant.

I. The statute, giving this summary process to get possession of

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lands, confines it in all cases to where the defendant holds over, "*after the determination of the lease by its own limitation,*" or the breach of some stipulation contained in such lease, where it terminates by its own limitation. Comp. Stat. 306 § 15, page 307 § 24 and page 308 § 30.

II. What the plaintiff offered to prove was, that the defendant was tenant at will of the said Bowker, or by sufferance, and nothing more. The agreement to quit, when Bowker requested was not the tenure by which the defendant held the land, but extraneous. The lease did not "determine by its own limitation."

III. The plaintiff offered to prove that the defendant acknowledged that he held possession under Paige; but by what tenure, the plaintiff did not offer to prove. If the defendant held possession under Paige, then the agreement with Bowker was wholly superseded, and the plaintiff was bound to prove that defendant held over, (as under Paige,) after the determination of the lease by its own limitation, or the non-fulfillment of some condition contained in the lease, which terminated by its own limitation.

IV. A justice of the peace has no jurisdiction "*where the title of land is concerned.*" Comp. Stat. 233 § 20. In this cause, the plaintiff was bound to show a good title in himself, and the same title he would be bound to show in an action of ejectment, as the plaintiff did not offer to show that he had ever been in possession of the premises. If the justice had jurisdiction in this cause, he would have had the same jurisdiction, had it been ejectment. The statute makes no distinction. It says "*where the title of land is concerned.*" The very offer of the deeds of conveyance, for the justice to pass upon, illustrates the absurdity of maintaining this action. *Haven v. Needham et al.*, 20 Vt. 183.

The opinion of the court was delivered by

BENNETT, J. The plaintiff seeks to be restored to the possession of the parcel of land, mentioned in his declaration; and though under the Revised Statutes of 1839, the action was to be brought before two justices of the peace, one of whom was to be a judge of the county court, yet in 1842, and 1850, the Legislature gave jurisdiction to a single magistrate. See Comp. Stat. of 1850, p. 307, 308.

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The objection, then, that there was no jurisdiction, is without foundation.

The statute of 1850, in substance enacts, that when a lessee of any lands or tenements, whether the lease be in writing or *by parol*, or when *any person* holding under such lease, shall hold possession without law or right, after the determination of the lease by its own limitation, or after the breach of any stipulation contained in the lease, by the lessee, or any person holding under him, *the person entitled to possession* of the premises may be restored to the possession thereof, in the manner provided by the act of 1842, and the act of that year fully prescribes the course of proceeding. The action is given, not only against the lessee, who holds over after the lease is determined; but also against any person holding under him, and it is given to *the person who is entitled to possession*.

In August, 1851, the defendant conveyed the premises in question to one Charles Bowker, and at the same time became a tenant either at will, or sufferance, to said Bowker, by a parol agreement, and he was to surrender them up, at any time, when requested, either to Bowker or his grantee, and this without any length of notice. Within a year from the time of the agreement between the defendant and Bowker, the latter deeded to one Paige, and Paige to the plaintiff; and the case shows that within the year, the three, Bowker, Paige and the plaintiff, all requested the defendant to surrender up the premises to the plaintiff, and that he refused so to do, and set up an adverse possession in himself.

The defendant's right as lessee was clearly determined, and he would be estopped from setting up an adverse right to Bowker, or his grantee, and in the language of the statute, he held over *without law or right*. The great question, which is made, is, as to the right of the present plaintiff, to maintain the action, and we think he may. Neither Bowker nor Paige have a right to the possession. The plaintiff is the only one in interest, and it would be strange if the statute should have required the suit to have been brought in the name of Bowker, and he recover in trust for the plaintiff. Whether we regard the defendant as a tenant at will, or sufferance, under Bowker, it is immaterial. In either event his interest had been determined; and after this he resists the claims of the plaintiff at his peril. If we held that the defendant's lease,

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being at will, was put an end to by the giving of the deed from Bowker to Paige, it would not defeat this action. The statute does not require that the relation of landlord and tenant should subsist between the parties to the suit when the action is brought. It is enough, if the defendant's possession commenced as a lessee, and he holds over without right, and the party suing has the right of possession, as derived from the lessor.

The statute not only gives the action against the lessee, but also against any person holding under him, and it is given to *the person entitled to possession*. It is no objection to this statute action, that the plaintiff's title may come in question. It may be a litigated point, where the action is not against the lessee, whether the defendant ever became his tenant; yet the action is as well given against the tenant of the lessee, as the lessee himself.

In New York under a similar statute, it was held, that the purchaser of the premises from the landlord might have this summary remedy. *Birdsall v. Phillips*, 17 Wend. 473; and the case of *Hildreth v. Conant*, 10 Met. 298, is much in point.

For the purpose of disposing of this bill of exceptions, we are to take it, that everything was proved which the plaintiff offered to prove.

The result then must be that the judgment of the County Court is reversed, and the case remanded.

LEWIS A. LOOMIS & CHARLES L. JACKSON v. WILLIAM LOOMIS.

Partners. Admissions of one Partner. Parties. Assignment, &c. Evidence.

The admissions by one partner, made after the dissolution of the firm and an assignment by him, in regard to the business of the firm previously transacted are admissible, as evidence against all the partners.

A party of record cannot be treated as a nominal party merely, if he has any interest in the amount recovered, even though that interest may be in the surplus, after paying specific debts, for which he has made an assignment.

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Until notice of an assignment is given to the debtor, the rights and interests of the debtor, are in no way affected by the assignment, and the same evidence, that would be admissible, as between the original parties, is admissible as against the assignee.

Where one is a partner, and co-plaintiff on the record, and directly interested to sustain the suit, and is liable for costs, his interest is of such a character, that he cannot remove it by any act of his own, so as to become a competent witness, against the consent of the defendant.

ASSUMPSIT for goods, wares, and merchandize sold the defendant by the plaintiffs, who were partners in trade, in Georgia in this State.

Plea, the general issue, and trial by jury.

On the trial the plaintiffs offered evidence tending to prove the delivery of the goods in question.

The defendant then offered in evidence the declarations of Lewis A. Loomis one of the plaintiffs of record. To the admission of these declarations, the plaintiffs objected on the ground that they were made subsequent to a dissolution of the partnership, and subsequent to a written assignment of said Lewis A. Loomis to one Charles Jackson, by whom it appeared this suit was instituted and prosecuted, as assignee. Also on the ground, that said Lewis A. Loomis, after said assignment and dissolution having become insolvent, was interested for the defendant, the defendant claiming that said goods were received to apply on a private debt of the said Lewis A.; but that if the said Lewis A., was not interested for the defendant, then he was a competent witness for him, and consequently his declarations out of court ought not to be received.

The court,—PECK, J., presiding,—overruled the objections, and permitted the defendant to prove the declarations so made by the said Lewis A. after said dissolution, assignment, and insolvency. The evidence tended to prove, that said Lewis A. Loomis had stated, after the said assignment and dissolution, that the goods in question were at the time they were delivered, which was before said dissolution and assignment, delivered to the defendant, with the knowledge and consent of both partners, in payment and discharge of a certain contract entered into between said Lewis A. and the defendant for the purchase of brick, by the said Lewis A., sufficient to build a store for the said Lewis A.

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The defendant also offered to prove, by the declarations of said Lewis A., made as aforesaid, that at the time said Lewis A. made the contract for the said brick, (the said contract was in writing,) both plaintiffs were present, and requested the defendant to take his pay for said brick out of their store; that the defendant declined at that time to agree so to do, but said if he should wish to purchase any goods, and could have them as cheap of the plaintiffs as elsewhere, he would take them to apply on the said contract; and that subsequently, and at the time the first goods in question were delivered to the defendant, it was agreed between said Lewis A. and the defendant, with the knowledge of the plaintiff, Jackson, that defendant should take goods to apply on said contract for brick, and that they were so delivered in payment for the said brick. To the admission of this testimony plaintiffs objected; but the court overruled the objection and admitted the same.

The plaintiffs then offered Charles L. Jackson, one of the plaintiffs of record, as a witness. It appeared, that previous to the commencement of this suit, said Charles L. had also executed a written assignment of all his interest in the late firm of Loomis & Jackson, to the said Charles Jackson; and the said Charles L. Jackson also executed and offered to deliver to the said Charles Jackson, then in court, an assignment, of the specific demand in suit, under seal; and the said Charles Jackson also executed and then and there offered to deliver to the said Charles L., a release of all claim or liability on account of the demand in suit, and to account to said Charles L. for the same whether collected or not, which release was also under seal. The said Charles Jackson also offered to deposit, with the clerk of the court, a sum of money, more than sufficient to pay the costs of this suit, to be held by the said clerk for that purpose, and to indemnify said Charles L. from all liability for said costs.

The court decided, that if said assignments and releases were delivered, and said money deposited, as aforesaid, still the said Charles L. was inadmissible as a witness for the plaintiffs.

There was no evidence tending to show the amount which had been received, by the assignee Charles Jackson, from the assets of Loomis & Jackson; but it appeared from the books of said firm, which were in evidence, that the goods in question were charged

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to the defendant in the ordinary manner that they charged their customers; and that they remained so charged and were upon the books apparently unpaid for, at the time of said assignment. And it also appeared from the books and other evidence, that said goods were all delivered after the date and execution of the written contract for the brick, and before the assignment by said Lewis A. Loomis, and before the dissolution of the partnership.

The evidence also tended to show that the defendant delivered about twenty-nine thousand brick, before the assignment and insolvency of said Lewis A., in pursuance of his contract, and that he had the residue ready for delivery, and subsequently delivered the same, it requiring about thirty-four thousand to build the store, which the brother of the said Lewis A. Loomis afterwards built. There was no evidence tending to show any breach by defendant of his contract for the delivery of the brick.

The jury returned a verdict for defendant. To the decisions of the court as herein before set forth, the plaintiffs excepted.

H. B. Smith for plaintiffs.

I. The case finds that the suit was commenced and prosecuted by Charles Jackson the assignee. And the defendant was allowed to show by the admissions of Lewis A. Loomis, one of the plaintiffs of record, made after the assignment, that it was agreed that the goods sued for should go in payment of his own private debt. This we think was erroneous.

1. There is nothing *against his interest* in making such an admission, for if his admission is true, he is not interested for the real plaintiff, or in a recovery by him, whatever contingent interest he may have in the assets of Loomis & Jackson.

2. And a plaintiff *without interest* cannot make an admission, or do any other thing to the injury of his assignee. 1 Greenleaf's Ev. 204. *Seargent v. Seargent et al.*, 18 Vt. 371. *Hough v. Barton*, 20 Vt. 455. *Frear v. Evertson*, 20 Johns. 142. *Phoenix v. Assignee of Ingraham*, 5 Johns. 412.

II. But Lewis A. Loomis was an inadmissible witness for the defendant. *Worall v. James*, 20 E. C. L. 177. *Norden v. Wilkinson*, 1 Taunt. 378. *Johnson v. Blackmun*, 11 Conn. 342. *Woodruff v. Wescott*, 12 Conn. 134. *Abbott v. Clark*, 19 Vt. 444. *Miner v. Downer*, 20 Vt. 461. *Paine et al. v. Tilden et al.*, 20

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Vt. 554. And the declarations of one who may be called as a witness are inadmissible. *Warner & Co. v. McGary*, 4 Vt. 507. This is the rule, in all cases where a person is not a party, unless the person is really interested in the suit, or there is an identity of interest in him and the party, or he is an agent. And we insist there is no reason why the same rule should not be adopted where parties without, are witnesses.

III. Parol evidence, of what was said at the time the contract for the brick was executed, was inadmissible. *Read v. Wood*, 9 Vt. 285. *Lane v. Neale*, 2 Stark. 105. *Mumford v. McPherson*, 1 Johns. 413. *Davis & Aubin v. Bradley & Co.*, 24 Vt. 55.

IV. Charles L. Jackson was a competent witness for the plaintiff. *Wellings v. Consequa*, Pet. C. C. 301. *Steele v. Phoenix Ins. Co.*, 3 Bin. Pa. R. 306.

Stevens & Edson for defendant.

In this case the defendant contends:

1. That the declarations of the plaintiff were properly admissible in evidence, notwithstanding the assignment of his interest in the demand in question, as it appears from the case that the defendant had no notice of such assignment. *Campbell v. Day*, 16 Vt. 558.

2. The assignment of Charles L. Jackson of all his interest in this demand, and the release executed by Charles Jackson to said Charles L. Jackson of all claims on account of this demand, with the agreement to pay him the amount of this demand, whether collected or not, will not aid the plaintiffs, as the witness offered, after the execution of these papers still remained liable for costs, and was therefore interested.

A deposit of money with the clerk will not discharge or release the liability of the witness for costs. Suppose the money to be deposited with the clerk, and the plaintiff recovers, would he not then take the money back as a matter of course? If so, then he has only deposited a sum of money with the clerk, and then is on the stand as a witness to swear it into his own pocket.

If the defendant recovers, could the plaintiffs plead the payment to the clerk, in bar of the judgment or execution?

The opinion of the court was delivered by

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ISHAM, J. We perceive no objections to the admission of the declarations of L. A. Loomis, though they were made after the dissolution of the firm of Loomis & Jackson, and subsequent to the assignment to Charles Jackson. An admission by one partner, made after the dissolution of the firm, in regard to the business of the firm previously transacted, is admissible as evidence against all the partners, and binding on the firm. *Gay v. Bowen*, 8 Met. 100. *Bridge v. Gay*, 14 Pick. 55. 3 Steph. N. P. 2425. *Prichard v. Draper*, 1 Russ. & Mil. 191-200. *Goddard v. Ingram*, 3 Adol. & El. N. S. 839.

L. A. Loomis is one of the plaintiffs of record, and as a general rule, his declarations are admissible, not only against himself, but all others, who have such a joint interest as will enable them to join in the suit. They are not to be treated as nominal parties merely, who have any interest in the amount recovered; though that interest may be in the surplus, after the payment of specific debts, for which the assignment is made. *Greenleaf's Ev.* § 171. 1 Maule & Selw. 249.

Those declarations are not rendered inadmissible, in consequence of the assignment of this claim by the plaintiff to Charles Jackson. No notice of that assignment was ever given to the defendant. It is regarded as a settled rule, that the title of an assignee to a chose in action is not complete, except as against the assignor, until notice of the transfer has been given to the debtor. Such notice is required to perfect the title of the assignee, and is as necessary, for all purposes, and for the same reason, that a change of possession is required, on the sale of personal property. *Vanbuskirk v. Hartford Ins. Co.*, 14 Conn. 141. Until notice has been given, the assignee holds the claim subject to such defence or dealing, as may exist or arise between the original parties. A release, or a receipt executed by them, or either of them, will be good as against the assignee; and any payment to them, or either of them, will be a good discharge of the debt. *Campbell v. Day*, 16 Vt. 558. If either can discharge or receive payment of the debt, it would be inconsistent to say, that they could not acknowledge it, and that such admissions, would not be proper evidence of the fact. The truth is, that until notice of an assignment has been given, the same evidence, that would be admissible as between the original parties, is admissible as against the assignee; for until such notice,

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the rights and interest of the debtor are in no way affected by the assignment. As those declarations would have been admissible if no assignment had been made, they are equally admissible now, as no notice of that transfer was given the defendant.

Neither are those declarations rendered inadmissible, as tending to impeach, alter, or vary the terms of the written agreement in relation to the sale of brick. The object of the testimony was to show a payment of this account, by applying the same on the claim due to the defendant, for the brick delivered under that written agreement. It is not pretended, that the contract for that application was made, when that agreement was executed. It is true, an arrangement of that kind was then proposed, and requested, by all the partners; but the defendant, at that time, refused to enter into such an arrangement, and the matter was ended. The admissions were offered to show a *subsequent contract* for the application of this account in that manner, *made when the goods were delivered*, with the knowledge and consent of all the partners. That a subsequent agreement of that kind will be binding, there is no doubt. 1 Greenleaf's Ev. § 303, 304. 3 Phil. Ev. 1477. *Bailey v. Johnson*, 9 Cowen 115-118. In proof of such an arrangement, at that time, the admission of either of the plaintiffs was proper evidence to submit to the jury; as its competency is not affected by their dissolution, or their assignment, nor is it objectionable, as contradicting their written contract. The jury have found that such an agreement was made, and this will operate as payment or satisfaction of this account.

Charles L. Jackson was properly rejected as a witness; at least, when offered by the plaintiffs. He was one of the partners, and co-plaintiff on the record. He is directly interested to sustain the suit, as he is liable for costs, in case of their failure to recover. His release of all his interest in the debt, and the offer to deposit money with the clerk to cover the costs will have no effect to restore his competency. An interest of that character, cannot be removed by any act of his own, so as to render him a competent witness, against the consent of the defendant. 3 Phil. Ev. 1550.

The judgment of the County Court is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ADDISON,
JANUARY TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

THE MATTER OF ELLERY HOWARD ON HABEAS CORPUS.

Habeas Corpus. Justice's Record and Mittimus for the violation of a Penal Statute, for selling Spiritous Liquors without a License.

The omission to state in the record of a proceeding before a justice for a violation of a penal statute, the amount of costs taxed in said proceeding before the magistrate, is not a fatal defect, though regularly it should be entered upon the record; but if it appears in the mittimus, it is a sufficient matter by which to amend the record, as the magistrate is always allowed to amend when there is anything in the papers to amend by.

And when the mittimus only requires the jailor to keep the convict until he pay the fine, and costs of commitment, and jailor's fees, the omission of the costs

Howard, *Ex parte*.

of prosecution will not render the commitment for fine and costs of commitment void.

In a commitment, for a violation of the license law, it is of no importance whether it is denominated a crime, or an offense, or neither.

Proceedings before a magistrate for such offenses considered.

HABEAS CORPUS. The relator in his petition set forth in substance, that he was confined in the common jail in Middlebury, in the County of Addison, as a prisoner in said jail, and that he was in the custody and keeping of David S. Church, Sheriff of said County, and keeper of said jail; and that he was confined and so kept, by virtue of a pretended process, issued and signed by Norman Tupper, a justice of the peace, within and for said County of Addison, upon an allegation or charge, that he, the relator, had committed the crime of selling intoxicating liquors. And that the relator is held illegally in said prison, and that a writ of *habeas corpus* may issue to said Church, to bring the relator before the Hon. Supreme Court, with the cause of his commitment, and as to the right of holding the relator, and for relief in the premises, &c.

The officer returned the following cause of detention.

“State of Vermont, Addison County, ss.

To any sheriff or constable in the state.

GREETING.

Whereas, Ellery Howard, of Salisbury, in said county, on the 18th day of July, A. D. 1853, at Salisbury aforesaid, before me, Norman Tupper, one of the justices of the peace within and for said county, was convicted of the crime of selling intoxicating liquors in two offenses, without authority therefor, and sentenced to pay to the treasurer of the town of Salisbury aforesaid a fine of twenty dollars, and costs of prosecution taxed at twenty-two dollars and nineteen cents, and to stand committed till sentence be complied with, as appears of record.

Therefore, by the authority of the State of Vermont, you are hereby commanded, on his, the said Ellery Howard's neglect or refusal to pay said fine and costs, to commit him, the said Ellery Howard, to the keeper of the jail in Middlebury, in the county of Addison, within the said prison, who is hereby commanded to re-

Howard, *Ex parte*.

ceive the said Ellery Howard, and him safely keep, until he pay the said fine and costs of commitment, together with his own fees, or until he be otherwise discharged, according to law. Hereof fail not, but due service and return make.

Dated at Middlebury this 25th day of November, 1853.

(Signed) NORMAN TUPPER, Justice of the Peace."

The officer's return upon this process, committing the respondent, was in due form of law.

The grand juror's complaint was as follows:

"To Norman Tupper, justice of the peace for the county of Addison, comes John J. Kelsey, grand juror for the town of Salisbury, in said county, and on his oath of office complaint makes, that Ellery Howard, of Salisbury, on the 9th day of July, 1853, at said Salisbury, did at divers times, sell, furnish, and give away intoxicating liquors, without authority therefor, contrary to the form of the statute in such case made and provided.

Salisbury, July 11, A. D. 1853."

The record of the judgment did not show any costs taxed against the respondent.

J. Prout and E. N. Briggs for the relator.

I. The record does not show that any sentence or judgment was rendered for costs; the record is to pay fine and costs, but shows no costs taxed against the respondent. Such a record does not warrant a mittimus for \$22 costs. *Hatch, ex parte*, 2 Aik. 28. 1 Swift's Dig. 568.

II. The record does not authorize the issuing of such process. It is for fine, and "*costs of commitment*."

III. The mittimus recites that respondent was convicted of the *crime* of selling in two offenses, &c. There is no such *crime*.

IV. The complaint is bad. Several distinct offenses are alleged in the complaint, consisting of one count. Stat. 1852, p. 16 § 18. Stat. 1850, p. 24 § 12.

J. W. Stewart for the State.

The opinion of the court was delivered by

REDFIELD, CH. J. The sufficiency of the record to sustain the mittimus is questioned. In reply to this it is said the record is

Howard, *Ex parte*.

not properly before us. It is true that the officer could not properly attach it to his return, probably; and at common law it is doubtful, how far the court would look into the whole record, unless it were for the purpose of sustaining and helping out the mittimus. That being sufficient on the face of it, the courts have ordinarily presumed the record was in accordance with the recitations in the mittimus.

But by our present statute, page 296 § 18, either party is allowed to adduce evidence, to contradict or support the return, and the court are required to decide, *upon the whole case* presented. Under this statute, it has been the uniform practice of this court, to look into the whole record.

But it does not seem to a majority of the court, that the omission to state in the record the amount of costs taxed, is a fatal defect. Regularly it should be entered upon the record. But its appearing in the mittimus is a sufficient matter, by which to amend the record, which the magistrate is always allowed to do, when there is anything in the papers to amend by.

II. The mittimus itself is perhaps defective, as to costs. It recites the adjudication correctly, but in the commitment, the jailor is only required to keep the convict, until he pay the fine, and costs of commitment, and jailor's fees, thus altogether omitting the costs of prosecution. But we do not think this omission will render the commitment for fine, and costs of commitment void. If the relator had paid or tendered the fine, and such costs, as the jailor, by the terms of the commitment is required to demand, and was still refused his discharge, the question would certainly be attended with more difficulty. As it is, we think it is good, as far as it goes, and the costs of prosecution may perhaps be regarded as waived.

III. We do not think it important whether this is denominated in the commitment, a crime, or an offense, or neither. All violations of penal statutes are in popular language criminal, and are crimes. But of crimes we have almost an infinite extent of enormity or degree.

IV. In regard to the complaint, it must be considered, that we cannot require the same refinement of technical accuracy, in a justice court, which might be expected in the higher courts of record. And in this proceeding, which is neither an appeal, nor a

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writ of error, but altogether a collateral matter, we should not perhaps require as much exactness and certainty as if the questions arose on demurrer, or in arrest of judgment.

But it seems to us that this complaint was what, and all, which the statute expected, in order to justify a conviction for several offenses, or even for a second offense, with increased penalty. And if this is all the statute requires, it is all *we can demand*.

The prisoner is remanded to his former custody.

GEORGE SMALL v. LEONARD & J. HASKINS & J. GRACE.

Trespass quare clausum fregit. Jurisdiction of a justice for a trespass on the freehold. Judgment by a Justice of the peace.—Appeal, the effect of a neglect to prosecute the same. Payment, under the statute twelve days before court, its effect. Retrahit. Collateral Estoppels, &c.

In the action of *trespass quare clausum fregit*, when the title is litigated, and that question adjudicated, and a judgment has been rendered in this form of action, by a court having competent jurisdiction, the judgment will conclude the parties, and operate as an estoppel, if the matter appears on the face of the record; or as evidence conclusive in relation to the title, in any subsequent litigation of that matter between the parties.

Justices of the Peace have jurisdiction in actions for trespass on the freehold, where the matter in demand does not exceed twenty dollars, and have authority to decide upon questions of title, whenever, in this action, the question arises; and the security of parties, in relation to the title of their land, is found in their right of appeal.

If a party commence a suit before a justice, and takes an appeal from the judgment of the justice, and afterwards pays the costs in settlement of the suit, twelve days before the sitting of the county court, and neglects to prosecute the appeal in the appellate court, it will operate as a *retrahit*, "or an open and voluntary renunciation of the suit;" and in such a case it is a bar to any action for the same cause, or duty. See *Cutlin v. Taylor et al.*, 18 Vt. 104.

An appeal from the judgment of a justice, vacates and renders the judgment null, and when the judgment of the justice is thus vacated, there is no existing judgment, which will conclude the parties, as a matter of evidence, or which can be relied upon as a matter of estoppel.

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And where the plaintiff, in the present suit, had previously commenced a suit, against these defendants, before a justice, for a trespass on the same premises, (this suit being for other trespasses on the said premises,) and appealed from the judgment of the justice, which was adverse to him, and twelve days before the setting of the county court paid the costs in settlement of said suit, *it was held* that the judgment of the justice, having been vacated by the appeal, and never affirmed, or prosecuted to judgment in the appellate court, there had been no adjudication on the question of title to these premises, and no existing judgment, which concludes the parties, as a matter of evidence, for that purpose.

The doctrine of collateral *estoppels* considered and discussed, by CHIEF JUSTICE REDFIELD, in an opinion which follows the opinion of the court, by ISHAM, J. in this case.

TRESPASS *quare clausum fregit*. Plea, the general issue, and trial by jury.

On the trial the plaintiff introduced evidence tending to show, that he had a possessory title to the *locus in quo*, and that the defendants had committed the alleged trespass.

The defendants then gave in evidence a copy of a justice's record, whereby it appeared, that the plaintiff had commenced an action of trespass before said justice, against these defendants and two others, who defended under the title of these defendants, and that such proceedings were therein had that said justice, on the tenth day of July, 1844, rendered a judgment for the defendants in said action for their costs.

It also appeared from the evidence in the case, that the action before said justice was brought to recover damages, for trespasses committed upon the identical land now in dispute, that on the trial before said justice, the title to said land was in question, and that on said trial, the plaintiff after having given evidence tending to prove a possessory title in himself, offered also to show a paper title; but the justice refused to receive any evidence of paper title, on the ground that it was too late for the plaintiff to introduce such evidence, after having elected to put himself upon a possessory title; that the counsel for the plaintiff thereupon declared, that he would no farther prosecute his action before said justice, but would appeal to the county court; and the justice rendered judgment for the defendants, upon the ground that the plaintiff had failed to make out a title to the land in dispute; and the plaintiff entered his appeal in due form of law; and that more than twelve days before the term of the county court to which said appeal was

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taken, the plaintiff paid to said justice the amount of the costs allowed the defendants, for their use, and in settlement of the suit; and that said suit was not entered in the county court.

The plaintiff did not claim, that he had acquired any title to the premises subsequent to the justice judgment. And the county court, holding the proceedings in the suit before the justice to be conclusive upon the parties, directed a verdict for the defendants.

Exceptions by plaintiff.

J. A. Beckwith for plaintiff.

I. The ruling of the court below stands on *Catlin v. Taylor*, 18 Vt. 104; but this case differs from that:

1. *There* was a regular jury trial and verdict on the merits; *here* the merits were not reached at all.

2. *There* the matter was unquestionably within the jurisdiction of the justice; *here* it may be doubted whether the justice had jurisdiction.

The Revised Statutes 170 § 7, it is true, expressly gives jurisdiction to the justice, of "actions of trespass on the free-hold where the sum in demand does not exceed twenty dollars;" but in the same section expressly excludes the justice from jurisdiction of actions "where the title of land is concerned."

These provisions are apparently contradictory; but it is evident that the legislature did not intend to give justices the power of trying titles; they meant to create a law to reach cases of petty depredations on the reality, where the *possession* was injured, and where the title would not be involved; thus saving the expense and delay of litigating in the higher tribunals. And this would seem to be the true reading of the statute, from the history of the legislation on this subject. The exceptions to the jurisdiction, for many years were, "trespass on the free-hold, *and* where the title to land is concerned;" as if the title of land, in their view, was not concerned in the action of trespass on the free-hold.

The contemporaneous legislation points in the same direction; it is sedulous to exclude a justice from interfering with the landed property of the state.

To permit this justice to adjudicate the title to this farm, is therefore to clothe him with power, which the legislature did not contemplate. And our courts have gone to say the least, *passibus*

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aequis, with our legislature, on this subject as appears from *Whitney v. Bowen*, 11 Vt. 250. *Huwens v. Needham*, 20 Vt. 183.

22 Vt. 565. Rule of construction indicated in 19 Vt. 223.

II. It is submitted, whether the authority of *Catlin v. Taylor*, ought to be recognized to its full extent, because (1.) the doctrine of that case in effect adds a new provision to the statute, and that to effect an estoppel. The statute (Rev. Stat. 174 § 49,) no where says that payment of the judgment shall operate as an affirmation of the judgment; but in the succeeding section does provide what, and for what purposes, it shall have such effect. Is not the rule "*expressio unius &c.*" applicable?

(2.) Ought not the rule to be limited to defendants only? If a defendant pays up damages and costs, he admits both the propriety of the *remedy* and the justice of the *claim*; while a plaintiff, by paying *costs* only, admits nothing but what pertains to the *remedy*.

(3.) There is also a diversity in cases; a rule of this character applied to rights or incidents of personal property, as in *Catlin v. Taylor*, might be productive of trivial consequences, as the justice's sphere is limited; while in cases involving title, take the one at bar, it is impossible to place bounds to the mischief which might ensue.

III. But if the rule must be applied, let the judgment, so called, be conclusive only as to the precise point in issue, and that was not the title, since it appears that that was not only not in issue, but that the Starksboro justice refused to hear any thing about it. Whatever else was decided, it cannot be seriously pretended that the title was adjudicated.

Barber & Bushnell and *E. J. Phelps* for defendants.

The plaintiff was not entitled to recover without showing title to the premises. Because, as the parties owned land adjoining, and the dispute was as to the location of the division line, if the plaintiff had not the title, the defendants had.

The court were right in ruling, that the former recovery was conclusive between the parties, as to the title. It was a judgment by a court of record, and of competent jurisdiction. Comp. Stat. Chap. 29 § 20.

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It was upon the precise point now in controversy, the title to this land.

That suit was brought to recover for a trespass upon the same land. Upon the trial, the same title now set up by the plaintiff, was in dispute and litigated. And the judgment was rendered upon the ground, that he had failed to establish that title.

It is not claimed, that he has acquired any other or additional title since.

The payment of the judgment, in favor of defendants for their costs, more than twelve days before the term to which the appeal was taken, in pursuance of the statute provision for that purpose, rendered the judgment equally conclusive as though it had been affirmed by the county court. *Catlin v. Taylor*, 18 Vt. 104.

The case is, therefore, in all respects within the universally acknowledged principle, that the judgment of a court of competent jurisdiction is conclusive, as evidence between the parties, or their privies, as to any point directly decided or legally to be inferred.

We refer to the leading English and American cases, and to some of the decisions in this state on the subject, as showing the extent and application of the rule. *Duchess of Kingston's case*, 11 State Tr. 261, cited from 2 Smith's Lead. Cas. 435-473 and notes. 1 Starkie Ev. 190, and cases cited. 8 East 366. *Street v. Bowington*, 3 Esp. 56. *Trevivian v. Lawrence*, 3 Salkeld 276. *Gardner v. Buckbee*, 3 Cow. 120. *Burt v. Steenburgh*, 4 Cow. 559.—*Kent v. Kent*, 2 Mass. 388. *Canaan v. Greenwood T. Co.*, 1 Cow. 1. *Betts v. Stow*, 5 Cow. 550. 2 Aik. 249. 2 Vt. 111. 12 Vt. 165. 13 Vt. 183. 15 Vt. 170. *Perkins v. Walker*, 19 Vt. 144.

Such a judgment cannot be impeached by the parties, nor shown to be erroneous. And it is equally conclusive, even when rendered by consent or default. *Briggs v. Richmond*, 10 Pick. 391. *McNiel v. Bright*, 4 Mass. 282. *Hoyt v. Gilston*, 13 Johns. 189. *Bagot v. Williams*, 10 E. C. L. 62.

Or by a court of special, or local, or limited jurisdiction, *Brown v. Wadsworth et al.*, 13 Vt. 170.

10 E. C. L. 62, above cited. Or by a justice court. *Blodgett v. Jordan*, 6 Vt. 580.

Parol evidence, (consistent with the record,) is always admissible to show what facts were actually litigated and decided. *Selden v. Tutop*, 6 Term 607.

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Martin v. Thornton, 4 Esp. 180. *Bagot v. Williams*. *Gardner v. Buckbee et al.* *Burt v. Steenburgh*, above cited. *Wood v. Jackson*, 8 Wend. 1. *Parker v. Thompson*, 3 Pick. *Perkins v. Walker*, 19 Vt.

Nor need this judgment have been specially pleaded in order to be conclusive. It does not operate as an estoppel, but as conclusive evidence of the fact. And as title to the land could be shown by the defendants under the general issue, they were not bound to plead their evidence. See the able note of Judge COWEN on this subject, (2 Cowen & Hill's notes, to Phillips' Ev., and the cases cited.) 2 Smith's Lead. Cas. Amer. note 474. *Wood v. Jackson*, above cited. *Young v. Runnell*, 2 Hill 478. This view was also fully examined and adopted by the court in the case of *Perkins v. Walker*, 19 Vt.

But, even if the judgment operated as an estoppel, as the defendants had no opportunity to plead it, it was admissible in evidence under the general issue. *Trevivian v. Lawrence*, above cited. *Howard v. Mitchell*, 14 Mass. 241. *Adams v. Barnes*, 17 Mass. 365. The defendants might have pleaded title. But they could not in the same plea set up an estoppel on the plaintiff from denying it. This would have been anticipating what the replication *might be*, and adding a rejoinder to the plea. Nor was the evidence objected to at the trial. *Gardner v. Buckbee*, above cited.

It has been suggested, that the limited character of the justice jurisdiction in actions of this nature, authorizes the conclusion that these judgments were not intended to be conclusive as to title.

No such inference can be drawn from the statute. It is one of the oldest and most carefully drawn acts in the state, repeatedly and ably revised, and tested by long practice. And it is inconceivable, if the legislature had so intended, that they should not have so said, in regard to a matter so important and so apparent. Besides, the provision limiting the jurisdiction, and for an appeal in all actions of trespass on the free-hold, which is extended to no other class of cases, except where a right or forfeiture is concerned of a consequence beyond the mere amount claimed, shows clearly that the judgments in these cases were regarded as conclusive.

The conclusiveness of a judgment is not derived from the statute which gives jurisdiction to the court, but is one consequence among many, which the common law attaches. And if jurisdic-

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tion to render judgment is given, its conclusiveness follows as a matter of law, unless expressly taken away by the act. And we have already seen that this consequence is universally held to attach to the judgments of all courts of record, however special, limited, or local their jurisdiction may be.

The opinion of the court was delivered by

ISHAM, J. On the trial of this cause at the circuit, the plaintiff introduced evidence to prove a possessory right to the land described in his declaration, and also the injury of which he complains. The parties are adjoining proprietors of land, and the matter in controversy is in relation to the dividing line between them. For the purpose of showing a title, and right of possession to the land in dispute, the defendants gave in evidence the record of a suit before a justice of the peace, in an action of *trespass* on the free-hold, brought in favor of the plaintiff against the defendants and two others, who defended under their title.

From this record, it appears, that a judgment was rendered for the defendants; that the plaintiff appealed; and that more than twelve days before the session of the court to which the appeal was taken, the plaintiff, under the provisions of the act, paid the justice the costs allowed the defendants, in settlement of the suit. The appeal was never entered in the appellate court, and was no further prosecuted. It is admitted, that the alleged trespasses were committed on the same land, and that the title was in dispute and litigated before the justice. The county court held the proceedings in the justice's court conclusive upon the title to the land, and directed a verdict for the defendants. For this ruling of the court, these exceptions have been taken. The question arises whether that record is conclusive, between these parties, against the plaintiff's title to the land.

The action of trespass *quare clausum fregit* is a possessory action, the gist of which is an injury to the possession. The title to the premises is not necessarily involved in its prosecution. In this respect it is unlike the action of *ejectment* and other real actions; yet, the title may be litigated, as a matter directly involved in the issue, and when that question is adjudicated, and a judgment has been rendered in this form of action by a court having competent jurisdiction of the matter, the judgment will conclude the parties,

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and will operate as an estoppel if the matter appears on the face of the record; or as evidence conclusive in relation to the title, in any subsequent litigation of that matter between them. Saund. on Pleading & Ev. 866. 1 East 244. *Burt v. Steenburgh*, 4 Cow. 559.

In relation to the jurisdiction of the justice, before whom these proceedings were had, and his right to adjudicate upon the question of title to the premises, we think there can be no doubt as to the construction of the act, or the intention of the legislature. The Comp. Stat. 233, § 20, expressly gives jurisdiction to justices of the peace in actions of trespass on the free-hold, where the sum in demand does not exceed twenty dollars. Jurisdiction is also given of all other actions of a civil nature, where the matter in demand does not exceed one hundred dollars, except actions of slander, false imprisonment, replevin above the sum of seven dollars, *and where the title of land is concerned*. This last exception will exclude from the jurisdiction of the justice, the action of ejectment; case, against an officer for the defective levy of an execution; covenant, on covenants in a deed, 2 Vt. 407; actions on the case for a nuisance, 11 Vt. 250; 20 Vt. 188; and, indeed, all actions in whatever form, where the title to real estate is involved, except this particular form of action. *Trespass on the free-hold*, where the matter in demand does not exceed twenty dollars. This *form of action, to this extent*, is given by statute, and jurisdiction when not expressly taken away, is necessarily given over every matter that arises on common law principles under the issue formed in the case. Where that jurisdiction exists, the conclusiveness of an adjudication is a matter of legal inference, unless a contrary provision is expressly made by statute.

The act of 1824, (Slades Comp. 140,) gave the same jurisdiction in this form of action to a justice; but provided, that if the defendant justified by plea of title, the records in the case were to be certified by the justice, and returned to the next term of the county court; in which court, the case was to be entered as an original action. Under this act, the legislature intended to take from the jurisdiction of the justice, the right to determine the question of title to land in this form of action, and this rendered necessary a special provision of that character. But in our present revision of the statutes, while the jurisdiction of a justice over this

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action is continued, the provision is omitted, that the records are to be certified to the county court, in case the defendant justifies under a plea of title; and instead thereof, the right of appeal is given to each party, whatever may be the matter in demand, while the right of appeal in other cases is limited. This legislation shows an evident intention to give the justice authority to decide upon questions of title, whenever, in this action the question arises; and the security of parties, in relation to the title of their land, is found in their right of appeal, which transfers the whole subject in controversy to an appellate court. This we think, has been the general and practical construction of the act.

The effect of the judgment, which was given in evidence, and of the proceedings before the justice, is a matter of more difficulty. So far as the cause of action is concerned on which that suit was brought, we must, on the authority of the case of *Catlin v. Taylor*, 18 Vt. 106, regard those proceedings, as a bar to any other suit for that matter, and no further claim for damages can be made. In giving that effect to those proceedings, it is not necessary to consider that claim as having been adjudicated, or that a judgment still subsisting has been rendered thereon. It is sufficient for that purpose to say, that the commencement of the suit, the appeal taken from the judgment of the justice, the subsequent payment of costs in settlement of the suit, and the neglect of the plaintiff to prosecute that appeal in the appellate court, will operate as a *retraxit*, "or an open and voluntary renunciation of the suit." In such case, it is a bar to any action, for the same cause, or duty. 3 Blac. Com. 296. Jac. Law Dict. 523, title *Retraxit*. If this suit had been brought for the same injuries, for which that suit was prosecuted, those proceedings would be a good defence to this prosecution. But this suit is brought for other injuries to the same land; and the question is, do those proceedings conclude the parties in this suit, on the question of title; in other words, is there a judgment unvacated, and still subsisting, in which the title to this land was the subject of express and direct adjudication. It is not sufficient, that a judgment was rendered by the justice, having jurisdiction of the subject matter before him, or that the title of the land was the subject of investigation; but it must also appear, that that judgment still remains in full force, unvacated and unreversed. Unquestionably, that judgment is binding upon the par-

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ties, and conclusively so, upon all matters that could have been and were actually determined and adjudicated, unless its effect is destroyed by the appeal allowed by the court. The statute gives to each party the right of appeal in cases of this character, but does not expressly declare, what its effect shall be on the judgment from which it is taken. If the appeal has simply the effect to *suspend the judgment* of the justice, until a judgment is rendered by the appellate court on the appeal, we do not see, but its effect may be conclusive, if the party appealing fails to prosecute his appeal to judgment. But if the effect of the appeal is to *vacate* the judgment, and remove the suit from the jurisdiction of the justice, it is obvious, that no such consequences will follow; for, there is then no subsisting judgment in the case. In case of an appeal from the probate court, the appeal is taken from some *order, sentence, or decree* of the court; and the judgment of the appellate court is upon that order or decree from which the appeal is taken, and when made, it is to be certified to the probate court, where the same proceedings are to be had, as if the decision had been made there. Comp. Stat. 324 § 86. The appeal gives no jurisdiction to the county or supreme court, to proceed and settle the estate, but simply to reconsider the decree of that court; and the judgment is to be enforced, and carried into effect by the probate court, as if no appeal had been taken. The jurisdiction of the probate court over the cause and the parties, is not taken away by the appeal. It may, therefor, more properly be considered, that the order and decree of the probate court, is merely suspended, until the final decree of the appellate court is obtained. *State v. McKnown*, 21 Vt. 503. But a different construction is given to the act granting appeals from the judgment of a justice of the peace. When such an appeal is taken, the cause itself is removed, as well as the jurisdiction of the court over the parties taken away. The county court on such an appeal, do not simply revise the judgment of the justice, and certify that judgment to be carried into effect by him; but they take cognizance of the cause itself and jurisdiction over the parties; they render their judgment, and carry that judgment into effect, by execution or otherwise, as if the suit had been originally commenced there. The justice has no further jurisdiction of the case, or of the parties, after the appeal has been taken. The effect of such an appeal

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must necessarily be to vacate and render null the judgment of the justice; and so far as an adjudication of any matter involved in the suit is concerned, the parties are placed in the same situation as if no judgment had been rendered. This question has been directly determined in the case of *Curtiss v. Beardsky*, 15 Conn. 522, under a statute similar to our own. It is deemed impossible to evade the reasoning and doctrine of that case, in its application to this. That was an action of debt on judgment rendered by a justice, from which an appeal was taken, but never entered in the appellate court, agreeably to the provisions of the act. The court observed, "that from the view of appeals from justices, which has been taken, we entertain no doubt, that upon principle, the effect of the appeal was to vacate and render null the judgment of the justice." It was held, that the action could not be sustained. In the case of *Campbell v. Howard*, 5 Mass. 376, CH. J. PARSONS remarked, "that when an appeal has been regularly allowed, no further proceedings can be had on the judgment, until through the default of the appellant, it be affirmed on the complaint of the appellee; and when the appeal is allowed, the judgment no longer, in legal construction, remains in force. The question has frequently been before the court, where a judgment appealed from, and not affirmed, has been pleaded in bar to another action for the same cause, and it has been considered as no bar; as a judgment inoperative, and not in force, after the appeal was allowed. *Paine v. C———*, 17 Pick. 142. In the case of *Fletcher v. Blair*, 20 Vt. 126, this court remarked "that the legal effect of an appeal was to vacate the judgment rendered by the justice, and to remove the entire case into the county court." Regarding this to be the proper construction of the act regulating appeals from justices, the conclusion follows, that when the judgment of a justice is thus vacated by an appeal, there has been no matter adjudicated, or determined by the court; there is no existing judgment, which will conclude the parties, as a matter of evidence, or which can be relied upon as a matter of estoppel.

The Comp. Stat. 238 § 74 provides, that any party having appealed from the judgment of a justice to the county court, may at any time, not less than twelve days before the session of such court tender and pay to the creditor, or leave with the justice the amount of such judgment; or may tender to such justice a confession of

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judgment in favor of the appellee, for the amount of the original judgment, with interest. In either event the statute provides, that there shall be no affirmance of the original judgment. If a judgment by confession is rendered, the statute provides, that it shall have the same effect as an affirmance of the judgment, to preserve all liens and securities, which the plaintiff has for the collection of his debt. But the statute nowhere declares, what the effect shall be upon the judgment appealed from, where the amount is tendered or paid by the party appealing. To affirm, or render a judgment effectual, as such, which has been previously vacated and rendered null, it is necessary, unless some provision by statute is made otherwise, that the same solemnities be observed, that are required in the rendition of the original judgment. It is equally necessary for the affirmance, as well as for the rendition of an original judgment, that it be done by some judicial tribunal, having jurisdiction of the matter for that purpose. The payment of the costs by the appellant to the defendant, cannot have such an effect; for that is the act merely of the party, while the rendition of a judgment, either original, or by affirmance, is a judicial act, to be exercised only by one having judicial authority. When the statute provides, that in case of a confession, its effect shall be an affirmance of the judgment, to preserve all liens, and makes no such provision in case of a tender of the judgment, it is a reasonable presumption, that no such effect was intended by the legislature. Under the provisions of our act, where the judgment of a justice has been vacated by an appeal, a new judgment can be obtained, only by an affirmance of the judgment in the county court, on the complaint of the appellee, or by a confession by the appellant, or by a regular prosecution of the case to a judgment by the party appealing. If the judgment of the justice has not been affirmed in one of these ways, the only effect that can be given to the payment of the costs, is to consider it in the nature of a *retraxit*, and a bar to any claim for the matters for which that suit was brought. To that extent the case of *Catlin v. Taylor*, 18 Vt. 106, is an authority; beyond that, we are not warranted to proceed by any adjudication of the court in that case. In giving that effect to those proceedings, we must regard the doctrine as peculiar to this state.

In Massachusetts, it would operate as a discontinuance of the

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suit merely, and would be no bar to any subsequent suit for the same matters. 5 Mass. 876, by PARSONS, CH. J.

The judgment rendered by the justice, having been vacated by the appeal, and never affirmed, or prosecuted to judgment in the appellate court, we think there has been no adjudication on the question of title to these premises, and that there is no existing judgment, which concludes the parties as a matter of evidence, for that purpose.

The result is, that the judgment of the County Court must be reversed, and the case remanded.

In this case Chief Justice REDFIELD delivered the following opinion, in which the learned Judge discusses the doctrine of collateral estoppels, and dissents from the intimation of the opinion of the court upon this subject.

Opinion by REDFIELD, Ch. J.

As I concur in the judgment just pronounced, it seems scarcely needful to specify the grounds of that opinion. But on one point, the intimation of the opinion of the court is so important, in its practical bearings, and so much opposed to my own views of the true principle of the just application of the doctrine of estoppels, that I shall briefly express my dissent.

I. I entertain no doubt the justice has jurisdiction of the action of trespass on the freehold, where the damages claimed are less than twenty dollars.

II. It is certain, that is an action where the title of land is *concerned*, but not ordinarily brought in *question*. This portion of the jurisdiction of a justice is, therefore, in derogation of the general limits of jurisdiction, between justice courts and the county court. In all other cases the justice jurisdiction is prohibited, "where the title of land is concerned." This exception, too, is clearly made from convenience, and not with any view to encourage the bringing of actions, where the title of land is concerned, even in trespass *quare clausum fregit*, before justices, in as much as full costs are given in such actions, in the county court, "where the court shall certify that the title of land came in question." This exceptional jurisdiction, in this class of actions, to justices, was clearly not intended to bring into justice courts actions of

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trespass, where the title of land came *in question*, or it was a *bona fide* object of the suit to try the title. This class of actions was undoubtedly intended to be brought, in the first instance, in the county court, else full costs would not there be given, without reference to the amount of damages. It was clearly, then, not the purpose of the legislature to have justices, in any action, try the title of land, but this jurisdiction, as is well known, was conferred, to enable justices to try that class of actions, where a question of damages merely was contested, and the claim below \$20. But the title might come in question, and if it did, would not oust the jurisdiction, after the repeal of the proviso to the act of 1824.

But we think it obvious to infer, that it was no part of the design of the legislature to confer upon justice courts, any jurisdiction to try and determine the title of land. In all other cases, actions involving the title to land are studiously excluded from the cognizance of such courts.

It is true indeed, that the question of the validity of title to land may *incidentally* come *in question* in almost any action, before a justice, and if it do so come in question, does not oust the jurisdiction. In an action upon note for \$50, the title of an estate sold for \$20,000 may come in question, and it become necessary to decide it, in order to determine the validity of the note. And it might equally come in question in an action upon a note below \$20, and so the judgment of the justice be final. But did any one ever suppose, that such an adjudication might be used to defeat a recovery upon all the other notes, and that it even settled the question of the title to the land between the parties too, so that, in an action of ejectment, this collateral determination of the justice, in the action on the note, could be used as a conclusive estoppel, upon the question of title to the land? We think few men would be prepared to carry the doctrine of collateral estoppels to such absurd lengths. But there is no calculating the extent to which *general rules* will be applied in the law. Lawyers and judges seem to have an abhorrence of exceptions to general rules, as nature was formerly said to have, to a *vacuum*! Common minds, especially if at all educated, seem to suppose there is a wonderful symmetry maintained, if general rules are made *universal*! But experience and true wisdom shows, that the symmetry and beauty

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consists in maintaining the principle, with such exceptional cases as do not fairly come within the principle.

And in carrying our illustrations of this case a step farther, to show that it does not really come within the true principle of estoppels, we have only to suppose the wife should swear the peace against the husband, and some collateral question should arise, by which it became necessary for the justice to pass upon the question of the validity of the marriage, or of an alleged divorce between the parties, could any man be so insane as to claim, that such questions were thus forever settled, in all future actions between the same parties? Or in an action of assumpsit, for necessities furnished the wife, it might become necessary for the justice, in order to determine the action, to decide either the validity of the original marriage, or its continuance; and is such decision of any force in any other action, even between the same parties, in another court.

It seems to me, these illustrations must show, to the comprehension of all, that a collateral determination of a question in a court, having no general jurisdiction of that class of questions, wants the basis of a binding estoppel, i. e., the decision of the same question, between the same parties, by a COMPETENT TRIBUNAL. Can it fairly be said that a justice court is a competent tribunal to decide questions of the title to real estate, when that whole subject has been studiously excluded from their cognizance? I trust not.

The whole subject of collateral estoppels is one of comparatively recent origin, in this state and in England. And it is exclusively of the creation of the courts, and like fictions of law, ought not to be allowed to aid in the perpetration of wrong. But if the doctrine is to be carried to this ludicrous extent, I, for one, shall feel compelled to fall back upon my LORD COKE's definition, that "estoppels are odious! not to be favored! that they shut out truth," &c. ! But when the question fairly arises, whether the decision of a justice, in an action of trespass *quare clausum fre-git*, settles finally the title to the land, I yet believe, that this court will not be prepared to perpetrate such an absurdity, as to hold that it does. I certainly do not desire to have it supposed, that by silence, I have become participator in such a deed. This doctrine has already been carried to the utmost limit of reason and

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justice, in this state. And within proper boundaries it is a salutary and conservative doctrine, but like all other conservatism, when misapplied, it is calculated to bring all its kindred into contempt, and public odium.

In the case of *Barrs v. Jackson*, 1 Young & Collyer 585, 594, after the most learned and elaborate examination of the subject, the learned vice Chancellor KNIGHT BRUCE, declares his opinion of collateral estoppels, even when the court has general jurisdiction of the subject, that they are never binding upon other courts, in regard to the same question between the same parties. What such a judge *would say* to a collateral estoppel, claimed on account of the incidental determination of the question by a court, having *no general jurisdiction of the subject matter*, it is difficult to conjecture, as no such question has ever arisen anywhere, except in the present case.

SAMUEL SWIFT, ADMR. v. RECTOR & GUY GAGE.

Ejectment. Possession. Landlord and Tenant.

The possession of a portion of a lot of land, claiming the whole, gives color of possession, which in construction of law, is possession itself.

A tenant, who is in possession of land under the landlord, cannot surrender or transfer the possession of the same, without the consent of the landlord, to a third person, so as to defeat the title of his landlord.

And occasional acts of turning in cattle, and cutting timber, while the landlord and his tenants maintained the exclusive possession of the land, will not defeat the possession of the landlord, as such acts under such circumstances, only amount to trespasses.

EJECTMENT for certain lands in Addison. Plea, general issue, and disclaimer by Rector Gage, one of the defendants, and trial by jury.

On the trial the plaintiff offered in evidence seven deeds from sundry persons to the intestate and his grantees, (but neither party made out a perfect paper title.)

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The plaintiff also offered evidence tending to prove, that lots Nos. 42 and 43, in Addison, were adjoining lots; No. 43, lying north of 42, and that they were bounded on the west by Dead Creek, that there was a stang set up from Dead Creek, into, and nearly across, lot 43, upon its southern part; that the plaintiff's intestate, previous to 1824, claimed and occupied lands adjoining lots 42 and 43, and that in 1824, he caused a fence to be erected from the east end of the stang, to a fence previously erected on the north side of his premises, so as to enclose lot No. 42, and that part of lot No. 43, lying south of the stang; the Dead Creek on the west, and the stang on the north, with the fence so erected constituting the fence on those sides; and put one Wilkins into possession of the premises so enclosed; and that a short time after, plaintiff's intestate hired the lot to one Woodward, who occupied the same till 1830, when Woodward surrendered the possession of the land to one George A. Gage, as the agent of Friend Adama, intestate, who occupied the same, as the agent or tenant of said Friend Adama, or his administrator, until the alleged eviction by the defendants.

The plaintiff's evidence further tended to show, that in 1830, Gen. Samuel Strong claimed to own to No. 43, and that Woodward had occupied a part of that lot, under Samuel Strong, before that time. That at that time Samuel P. Strong and Enoch D. Woodbridge, the agents of Samuel Strong, went on to the premises, for the purpose of taking from Woodward possession of lot No. 43; that George A. Gage, as the agent of Friend Adama, and Woodward were present. S. P. Strong, for his father claimed the whole of lot No. 43, and contended that Woodward should give him possession of the whole lot; but said Gage claimed to be in possession of the land south of the stang for Friend Adama, and that S. P. Strong never had any possession south of the stang.

The defendants introduced in evidence a copy of the distribution of John Strong's estate, recorded in Addison, in May, 1838, and also several deeds from persons to them and their grantors.

It was admitted that Samuel P. Strong is the residuary legatee of Samuel Strong, and that all the title to the premises that Samuel Strong had at his death, vested in Samuel P. Strong.

The defendants also introduced evidence tending to prove, that after the conveyance from Samuel P. Strong to one Samuel

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B. Booth, under whom they claimed, that the tenants of said Booth turned in cattle south of the stang, and endeavored to get possession, but George A. Gage would turn them out, and claimed the land south of the stang; that Booth's tenants occasionally cut wood south of the stang.

The defendants contended, (and some of the evidence tended to prove,) that George A. Gage was not the tenant or agent of Friend Adams, in relation to lot No. 43, or any part of it. Other parts of the evidence tended to prove, that George A. Gage claimed to hold possession of all the land south of the stang for Friend Adams, and that said Adams claimed that said Gage held possession of the land under him.

The court,—PIERPOINT, J., presiding,—charged the jury, that the evidence in the case did not prove a paper title in the premises in either party; but if Friend Adams, having a deed of lot No. 43, on record in the town of Addison, went into possession by himself, or his agent, of any part of the lot, his possession would extend to the boundaries of the lot, unless some other person was previously in possession of the same lot, or some part of it; and unless such other person held some claim of title on record in the town clerk's office, his possession would not extend beyond his actual occupancy; and if Wilkins took possession of the premises as the agent or tenant of Friend Adams, and surrendered it to Woodward under a contract to hire it of Adams, Woodward's possession would be the possession of Adams, as long as he continued in possession, and that Woodward, without the knowledge of Adams, could not transfer the possession to a third person so as to defeat the rights of Adams; and if George A. Gage, went into possession of the land, as the agent or tenant of Friend Adams, at the time Woodward surrendered possession to Strong, and Strong so understood it, at the time he took possession from Woodward, of the land north of the stang, and Gage so remained in possession until Strong deeded to Booth, and Strong knew that Adams claimed to be in possession adverse to him, then Strong's deed to Booth, as against Adams and those claiming under him, is void, and gave Booth no right against them. And if George A. Gage remained in possession under Adams or his representatives, up to the time that Guy Gage took his deed from Booth, and Booth had been unable to get possession of the

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land, the deed from Booth to Guy Gage is void, and gave him no right to enter and oust the plaintiff, and the plaintiff is entitled to recover for such ouster; and that occasionally turning in cattle by Booth or his tenants, the same being turned out by Gage, or occasionally cutting wood on the south side of the stang, would not defeat the plaintiff's right of recovery.

The jury returned a verdict for the plaintiff, as against Guy Gage, and not guilty as to Rector Gage.

P. O. Tucker for defendant.

Neither party had any perfect paper title to lot No. 43.

It is claimed for the defendant:

I. That the fence made by Adams or his tenant in 1824, did not constitute such an enclosure of the south part of lot No. 43, as to amount to taking possession of the land.

II. That Adams' putting Wilkins into possession generally of lands, which happened accidentally to be enclosed by a creek and stang, including among them a part of lot No. 43, would not give him any possessory right to lot 43, if he had no legal title of record to it, and made no specific adverse claim to be its owner; and that such a possession passed by Wilkins to Woodward, and by Woodward to George A. Gage, would not (even if George A. Gage was Adams' agent, which is left doubtful by the case,) operate to make a title by possession in Adams.

III. That if Adams even commenced a possessory claim to the north part of lot No. 43, in 1824, the possession being disputed by Strong's claim in 1830, and Woodward having been in possession under Strong of part of the lot previous to 1830, the possession of the lot thereby became a mixed possession, which would not operate to make a title in either.

IV. That the possession continued to be such a mixed possession after Booth purchased of Strong.

V. That it was not necessary that the claim of record, arising from the distribution of John Strong's estate, should be of record in *the town clerk's office of the town of Addison*, in order to protect any possession claimed under it, beyond "actual occupancy."

VI. That Samuel P. Strong's deed to Booth was not void by reason of the adverse claim of Adams, as set forth in the exceptions. Woodward's possession of part of lot No. 43, under Strong,

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was sufficient to prevent Strong's deed from being nugatory, while the title to the lot was in dispute between Strong and Adams. Nor was Guy Gage's deed from Booth void, for the same reason.

F. E. Woodbridge and J. Pierpoint for plaintiff.

The case shows that Friend Adams went into possession of the premises under color of title, enclosing and claiming the same in 1824. His possession was of a character that would have enabled an actual owner to have maintained either trespass or ejectment against him.

Woodward being in possession under Adams, could not transfer the possession to a third person without Adams' knowledge, upon the well settled principle, that a tenant cannot divest himself of that relation to his landlord without actual notice.

Strong's deed to Booth, and Booth's deed to Guy Gage, under the circumstances detailed in the bill of exceptions, are void. Comp. Stat. chap. 63 § 29.

The occasional turning in of cattle by Booth, the same being turned out by the agent of Adams, or the occasional cutting of wood upon the premises, do not amount to acts of possession, but mere acts of trespass; and that, even though Booth had a deed of the premises. In this case Booth had no color of title, his deed being recorded in 1849, twenty-five years after actual possession by Adams. *Dockitt v. Linsley*, 2 Aik. 155.

The opinion of the court was delivered by

REDFIELD, Ch. J. It is probable that one proposition, laid down in the charge to the jury, is expressed in somewhat too broad terms, to be applicable to all cases coming within its terms. For it is now perfectly well settled, that a possession of a portion of a lot of land, claiming the whole, gives color of possession, which, in construction of law, is possession itself; and that to produce the effect, it is not requisite that the claim should be, by deed, recorded in the proper office, or that it should be, even by a deed, containing all the statute requisites to convey land. It is enough, that it be in writing, capable of being produced on request, or even that it be distinctly indicated upon the land by unequivocal monuments, which would not fail to attract the attention

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of counter claimants. I have so often enumerated the authorities upon this subject, that it is scarcely needful for me to repeat them here. If this portion of the charge could have misled the jury, the defendants would doubtless be entitled to a new trial.

But it seems to us, the case must be regarded as altogether clear for the plaintiff, upon the facts detailed in the case, and in regard to which, there seems no controversy.

Adams and his tenants had been in uninterrupted possession of the portion of land, lying south of the stang, and that is all the land in controversy in the case, from 1824 when it was vacant, until the eviction, and no perfect title claimed to have been shown in the defendants. The defendants claim in one of two modes : 1. That Adams' tenant surrendered the possession to those from whom the defendants derive title. But this a tenant has no power to do without the consent of his landlord, and there is no pretense of any such consent.

If any such thing were attempted it would still leave the possession in the plaintiff's intestate, and he could maintain ejectment against any one going into possession under any such arrangement, at any time within fifteen years after it came to his knowledge.

2. It is claimed that the occasional acts of turning cattle into the lands, and cutting timber, which were at the time strenuously resisted by Adams and his tenants, who all along maintained the exclusive possession of the land, constituted such a joint possession of the land, as will defeat the effect of Adams' prior possession. But it is obvious that such acts, under the state of facts existing, could only amount to trespasses, and did not give any possession in fact, or in law.

We think, therefore, the judgment must be affirmed.

Phelps v. Williamson.

JAMES S. PHELPS v. ABRAHAM WILLIAMSON.

Statute of limitations. New promise.

Where the defendant, speaking of his liabilities, said in relation to the note in question, "that he had signed the same with his son, and that in the end he thought he should have it to pay," it was held, that this was an unqualified acknowledgment that the note was signed by him; that it was still unpaid; and that his liability was then subsisting; and that this acknowledgment took the case out of the statute of limitations.

And the defendant saying at the time, "that enough had been paid to pay the debt, if it had been paid when it should have been;" does not vary the case, or take it out of the rule, which has been recognized by the decisions in this state, on this subject.

ASSUMPSIT on a promissory note, executed August 14, 1840, by one Samuel B. Williamson as principal, and by the defendant as surety.

Plea, the general issue and the statute of limitations, issue joined, and trial by the court June Term, 1858, PIERPOINT, J., presiding.

On the trial the plaintiff offered in evidence the note declared on, with the endorsements thereon. The plaintiff also offered, as a witness, one Wright, who testified in substance, that some four years previous, the defendant, in speaking of his liabilities, spoke of the note in suit, with other notes, and said that "he had signed with his son, and in the end he thought he should have this to pay," and added, "that there had been enough paid to pay the debt, if it had been paid when it should have been," or "in the first place."

The witness testified, that he gathered from what defendant said, that the payments had been made by Samuel B. Williamson, and not by the defendant.

The sum for which the note was originally given, considerably exceeded the amount of the endorsements.

The defendant claimed that the evidence was not sufficient to take the case out of the statute of limitations; and that if sufficient, not to the extent of the amount apparently due on the note, deducting the endorsements.

The court decided that the evidence was sufficient to take the case out of the statute of limitations, and rendered judgment for

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the plaintiff to recover the full amount of the note, deducting the endorsements.

Exceptions by defendant.

J. A. Beckwith for defendant.

1. To remove the statute bar, there must be an acknowledgment of the debt as still due, with an apparent willingness to remain liable for it, or at least, no avowed intention to the contrary.

Neither of these conditions occur in this case. The admission is, "that he had signed with his son, and in the end he thought he should have this to pay." This does not admit a valid subsisting debt *then due*, and the most which can be made from it, is, that at some time he had contracted an obligation which ultimately might be enforced against him.

The expression "that in the end he thought he should have it to pay," so far from conveying an idea of a "willingness," directly suggests an apprehension or fear that he might be compelled to pay it.

2. At all events, it cannot be claimed seriously, that the defendant should be held to an extent greater than his admission. Suppose he had said "half the debt is still due, and I am willing to pay half," would such an admission remove the bar as to the whole debt? So here the declaration of the defendant was coupled with a statement that "enough had been paid to pay the debt, if paid when it should have been." Can he be held beyond the face of the debt?

3. Payments made by the co-contractor are of course under our laws no evidence to charge the defendant in this case. Comp. Stat. 381 § 26.

J. W. Stewart and *E. J. Phelps* for plaintiff.

1. It is a settled principle in the jurisprudence of this state, that an unqualified acknowledgment that a debt is due, takes it out of the statute of limitations.

The admission by the defendant, that he jointly with his son, executed the note; his regarding and acknowledging it as one among his then subsisting liabilities, and his avowed expectancy that in the end he would have it to pay, amounts to a sufficient acknowledgment, to remove the statute bar and revive the note.

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Gailer v. Grinnell, 2 Aik. 349. *Olcott v. Scales*, 3 Vt. 173. *Barlow v. Bellamy*, 7 Vt. 54. *Phelps v. Stewart et al.*, 12 Vt. 256. *Joslyn v. Smith*, 13 Vt. 358.

2. A payment made by one of several joint contractors, when recognized and treated as such by the others, is the same in legal effect, as though made by all, and would operate to take the demand out of the statute as to all; such recognition is a virtual adoption by all, of a payment made by one.

The opinion of the court was delivered by

ISHAM, J. The judgment of the County Court, in this case, must be affirmed. The fact is distinctly found in the case, that within six years from the commencement of this action, the defendant while speaking of his liabilities, observed in relation to this particular note, "that he had signed the same with his son, and that in the end he thought he should have it to pay." This was an unqualified acknowledgment that the note was signed by him; that it was still unpaid; and that his liability was then subsisting. The declaration was unaccompanied by any statement that the debt was unjust, or that there existed any matter upon which he relied as a defence, to protect him from the payment of the note. These circumstances bring the case within the rule, which has been recognized by the various cases decided in this state, that where there is an acknowledgment that the debt is still subsisting, and unpaid, unaccompanied by any denial of the justness of the debt, or of his liability to pay it, the law will raise an implied promise to pay the debt, which will be sufficient to prevent the operation of the statute. This was the rule given by ROYCE, late *Chief Justice*, in the case of *Phelps v. Stewart et al.*, 12 Vt. 256, in which he says, "that it is settled law in this state that an unqualified acknowledgment of the debt as unpaid and still subsisting, is evidence from which a new promise to pay is to be inferred." In *Joslyn v. Smith*, 13 Vt. 357, the court remarked "that there is no necessity of any positive evidence of willingness to pay." If the debt is recognized as a just debt and not paid, the law presumes willingness to pay, unless there is some protestation to the contrary. *Carruth v. Paige*, 22 Vt. 180.

The application of this principle to this case is not affected by the statement, "that enough had been paid to pay the debt, if it

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had been paid when it should have been." This is not a denial of his liability on the note, or the expression of an unwillingness to pay it; on the contrary, the expression contains the implication that something was due on the note at that time, as the payments were not made in season to prevent the accumulation of the debt to a greater amount, than the payments made.

In the case of *Williams v. Finney*, 16 Vt. 298, the defendant stated that he would call and settle with the plaintiff, but that there was not much due him. This was held sufficient to revive the debt, and charge him for whatever balance was found due on the claim. It does not appear from the case, that any pretence was made, but that all the payments which were made on the note, were duly applied and endorsed. With this fact existing in the case, when the defendant acknowledged the execution of the note, and a subsisting liability to pay it, it was a recognition of a balance due thereon, as then existing; and whatever that balance may be, it is removed from the operation of the statute. This renders it unnecessary to pass upon the effect of the payments made and endorsed on the note; or upon the question, whether a subsequent recognition of those endorsements, by another joint contractor, will be sufficient under the statute, to revive the debt against him; as the operation of the statute in this case is removed by the personal acknowledgment of the defendant.

Judgment affirmed.

 TIMOTHY C. SMITH v. ERASTUS MEECH.

Action of Account. Landlord and Tenant. Contract.

Where one rents a farm, and by the terms of the contract the landlord stocks the same, and the tenant is to have one half the growth of the cattle and one half of the wool produced from the sheep, it was held, that while the tenancy is still subsisting and a portion of the time of the lease unexpired, the tenant cannot be regarded as having acquired any such perfected interest in the property, as will be liable to be levied upon and sold, by his creditors. *Smith v. Niles*, 20 Vt. 315.

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In contracts of this kind, the right of the tenant does not become perfected, until his part of the contract is performed.

ACTION OF ACCOUNT, in which the plaintiff claims to recover an undivided interest in some cattle and sheep, which interest had been attached and sold at a sheriff's sale upon an attachment against one Edward A. Barney, who was a tenant on defendant's farm.

The defendant pleaded 1st. That he never was nor is bailiff or receiver of the property in question. 2d. That the plaintiff never did require or request him to render an account &c. Issue joined and trial by jury.

On the trial the plaintiff offered evidence tending to prove, that in the Spring of 1846, the defendant leased, by parol, to one Edward A. Barney a farm in Hinesburgh, for the term of five years, (unless said Meech should sell the farm before the expiration of said term,) and that it was agreed between the defendant and said Barney, as a part of the contract in leasing the farm, that defendant should stock the farm, by putting on cattle and sheep; and that said Barney should have one half the growth of said stock, and one half of the wool produced by said sheep; and that the cattle and sheep mentioned in the officer's return, on a certain execution against said Barney which was put into the case, were a part of the stock so put on to the farm by the defendant.

The plaintiff then introduced a writ of attachment against the said Barney, the officer's return thereon, a record of the judgment thereon, and execution and officer's return, copies of which were put into the case, by which it appeared that the interest of the said Barney in the cattle and sheep in question was attached and sold. The plaintiff also offered evidence tending to prove, that the same was sold by the written consent of the parties to that suit, as set forth in the officer's return. The plaintiff claimed, that by virtue of such sale by the officer, he became a joint owner with the defendant of such cattle and sheep, and could maintain this action.

The court,—PIERPOINT, J., presiding,—decided that the plaintiff did not, by virtue of such sale, acquire such an interest in said cattle and sheep, as entitled him to commence and sustain this action, and directed a verdict for the defendant.

Exceptions by plaintiff.

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P. C. Tucker for plaintiff.

1. The plaintiff contends, that the interest acquired by Barney in the stock upon the farm, which he leased of the defendant was the interest of a joint owner, or tenant in common, and one which could be attached by his creditors. Landlords and tenants are holden to be tenants in common. *Hurd v. Darling et al.*, 14 Vt. 214. *Frost v. Kellogg*, 23 Vt. 308.

2. That said interest, being legally attached, was legally sold by the officer. Comp. Stat. 245 § 27 and 246 § 32.

3. That the purchaser of said interest, at said sale, acquired by said purchase a legal title thereto, and that by virtue of said title, he became by operation of law, a joint owner or tenant in common of said personal property with the defendant in the present action. 1 Swift's Digest 170.

4. That the action of account can be sustained, and is the appropriate action to recover such interest when withheld by the joint owner or tenant in common. Comp. Stat. 289 § 1.

E. J. Phelps for defendant.

1. Barney had no attachable interest in the property.

His contract was executory and unperformed. Till performed, he had a mere prospective interest, to be acquired only by the successful fulfillment of his contract, and liable to be defeated by many contingencies.

He was in no sense a tenant in common, at the time of this attachment. *Bishop v. Doty*, 1 Vt. 37. *Hurd v. Darling et al.*, 14 Vt. 214. *Frost v. Kellogg*, 23 Vt. 309, and cases there cited.

2. Even if Barney had a property in the cattle, the contract required that they should be kept on the farm till the expiration of the lease. They could not therefore be previously attached by his creditors. *Smith v. Niles*, 20 Vt. 315.

3. If Barney's interest was attachable, it should have been specifically described in the attachment, sale, and returns. This defect cannot be supplied by parol.

4. In no event can this action be maintained.

It is absurd to say, that a creditor of Barney can by attachment constitute himself a party to a contract between Barney and Meech, and proceed to enforce it in this manner.

And if not a party to the contract, he acquired no interest in

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the cattle. Because the extent of Barney's right is his privilege under the contract.

If the debtor had an attachable interest, and it was properly attached and sold, the purchaser must receive his property from the officer. He certainly cannot purchase a right to maintain this action. *Burroughs v. Wright et al.*, 10 Vt. 510.

The opinion of the court was delivered by

REDFIELD, CH. J. I. It certainly does not appear, by the present bill of exceptions, that the plaintiff offered testimony tending to show that the tenancy of Barney, which was for five years, defeasible upon defendant's sale of the premises, had in any manner terminated. And we certainly could not presume a substantive fact of such controlling importance, against the judgment of the court below. The tenancy must then be regarded as still subsisting and three years of it yet unexpired. In this state of the case, upon the principle of the case of *Smith v. Niles*, 20 Vt. 315, we could not regard Barney as having any such perfected interest in the property, as was liable to be levied upon and sold by his creditors. It was at most an inchoate interest, which rested merely in contract, and was to a great extent executory. In contracts of this kind it has often been held of late, that upon general principles, the right of the tenant does not become perfect until his part of the contract is performed. That was so ruled in Chittenden County, at the last term in *Briggs v. Bennett*, and a number of other cases, depending upon similar principles in conformity with a decision of the Mass. Courts, 24 Pick. A sheriff cannot ordinarily levy upon personal property so situated, that it is impracticable to deliver the thing to the purchaser, at his sale. And it is not claimed, that this case as here stated, and we know nothing else of it, presents such a right, i. e. to deliver the property on sale.

II. It becomes unimportant to consider the general question of the right to sustain account between these parties, which seems certainly difficult, even upon the plaintiff's theory of his rights acquired by the sheriff's sale. But as we hold he acquired nothing by that sale, the action must fail of course.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF RUTLAND.
FEBRUARY TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

FREDERICK CHAFFEE v. ORCUTT SHERMAN.

Trespass. Conditional Sale &c.

The plaintiff let L. have a quantity of goods for the purpose of peddling, and the goods were to remain his until sold, and he had a right to retake the goods at any time, and L. had the right to return them when he pleased; when the goods were sold, L. was to account for them at prices specified in a list of the articles made out by the plaintiff, for L., and by agreement between the parties, L. deposited with the plaintiff a sum of money, equal in amount to the value of the goods, which sum was to remain, as collateral security, for the performance of the contract on the part of L., in the hands of the plaintiff. After L. had disposed of a portion of the goods so taken, he took more goods of the plaintiff on the same terms, and at the time paid \$39, in money to the plaintiff, which sum was equal in amount, into the sum of \$4,12, to the value of the

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goods taken at this time, and took a list of the articles, as before, upon which \$39 was credited as so much paid, and also retained the goods unsold, which he received the first time. These goods while in the possession of L., were attached by a creditor of L. as the property of L.; and the plaintiff brought his action of trespass to recover the value of the goods so attached. Upon the foregoing state of facts, *it was held*, that the plaintiff could maintain the action of trespass, but could only recover the balance unpaid on the second bill of goods, after deducting the \$39 and interest.

TRESPASS for certain goods of the plaintiff.

The cause came to the county court by appeal from the judgment of a justice of the peace.

Plea, the general issue, and trial by the court.

It appeared on trial, that the goods described in the declaration were taken by the defendant from the possession of one Jacob H. Lampson by virtue of a writ of attachment, in favor of one Ebenezer Porter, against said Lampson, regularly issued and put into the hands of the defendant, (who was constable of Poultney,) for service, upon which judgment was rendered and execution duly issued, and put into the defendant's hands, so as to charge the property.

It also appeared that said Lampson was, previous to the receipt of the goods as hereinafter stated, poor and in debt, and that he wanted to procure the goods in question, of the plaintiff, to peddle on commission, and it was agreed between the plaintiff and said Lampson, that the plaintiff should deliver to Lampson goods on the following terms:—Lampson was to take the goods for the purpose of peddling, but the goods were to remain the property of the plaintiff until sold, and the plaintiff had a right to retake them whenever he pleased, and the said Lampson, had a right to return them, or any part thereof, at his pleasure, and the goods sold by Lampson were to be accounted for to the plaintiff at the prices specified in a certain list of the articles so taken, which list was made and furnished to Lampson by direction of the plaintiff, and for the purpose only of enabling Lampson to know what he had received, and the prices for which he was to account for them. It was, as it appeared, agreed between said Lampson and the plaintiff, that Lampson should, and he accordingly did deposit with the plaintiff a sum of money, (\$50) equal in amount to the value of the goods taken, as specified in the list of articles taken, the first time, which was to remain as collateral security for the faithful performance of the contract on the part of Lamp-

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son. That after having disposed of a portion of the goods received the first time, the said Lampson came to the store of the plaintiff and procured more goods of the plaintiff, upon the same terms, and then took a similar list of the articles and prices, and then paid the plaintiff the sum of thirty-nine dollars, (\$39,) and took away the articles specified in the second list, and retained the articles unsold which he received the first time, which constituted all the goods taken by the said Lampson, he leaving the money deposited the first time in the hands of the plaintiff, as security, as aforesaid.

The two bills of articles delivered to Lampson were put into the case, by which it appeared that the \$39 was equal into \$4,12, to the value of the second bill of goods.

The plaintiff offered said Lampson as a witness, who testified to the terms on which he received the goods of the plaintiff.

The attachment, record of judgment, and execution, in the suit of *Porter v. Lampson* were put into the case.

Upon the foregoing facts, the court rendered judgment for the plaintiff to recover the value of the goods taken by the defendant.

Exceptions by defendant.

J. B. Beaman and *J. T. Harris* for defendant.

I. The right of *property* in the goods passed to Lampson by their delivery, whether the contract was a sale or *mutuum*. Story on Bailments § 439, 283. *Chase et al. v. Washburn*, Am. Law Reg. 487. 3 U. S. Digest 381.

II. The plaintiff had neither actual or constructive possession of the goods, and cannot sustain trespass. *Swift v. Solace*, 23 Vt. 279. Greenleaf's Ev. § 616. *Fairbanks v. Phelps*, 22 Pick. 535.

Lampson had a right to possession, to sell and make his profits, he had a lien for the prices paid. Story on Agency § 335, 350. Story on Bailments 121. 15 East 607.

R. R. Thrall & W. H. Smith for plaintiff.

Lampson was the bailee of the plaintiff, and was not the owner of the goods at the time they were attached.

The opinion of the court was delivered by

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REDFIELD, Ch. J. It seems that the plaintiff was secured by a deposit of money, to the full value of the first bill, and actually paid all of the second bill except \$4,12, so that in fact he cannot have any ultimate equity, beyond the sum of \$4,12. All that is recovered beyond that sum, must go to the credit, and for the benefit of Lampson. Beyond that, this suit is Lampson's suit. And if the property was so situated, that it was exempt from attachment, on his debts, the defendant is a mere wrong doer, and the suit might well have been in Lampson's own name, the same as he might recover for other property, exempt from the levy of an execution.

We have not as yet, perhaps, decided any case, going this length. The cases of conditional sales, where the property has been held exempt from attachment, have always shown a beneficial interest in the vendor, at the time of the recovery to the extent of the judgment. But here that contingency is not very obvious.

The plaintiff had received money enough to pay him for the goods; he had the goods for sale, and had delivered them to Lampson for that purpose, on the condition of sale or return. This money was undoubtedly put to use by plaintiff. The contrary, certainly does not appear. It would be his duty to put it to use, or upon interest. On the most favorable construction, then, it created a trust in Chaffee, for the benefit of Lampson. So too, the goods must be regarded, as creating a trust, on the part of Lampson, for the benefit of Chaffee. But these are to be kept distinct, and subsisting, for some purpose! It does not seem to me it can be for the security of plaintiff, beyond the \$4,12. For he is already secure beyond all peradventure. What then is the purpose of these twin trusts? Certainly not exclusively to keep the property out of the reach of all legal process! This is scarcely a legal purpose. But it does seem, on the principle of the decision below, to have that effect. This money cannot be reached by trustee process, because the plaintiff has a beneficial interest in it, for his own security.

And if the creditor had attempted that mode of process, there is no great probability, perhaps, that Lampson would ever have volunteered to pay for the goods, in any other mode, so as to leave the money to be held by the trustee process. And when the goods are attached, in the ordinary mode, the full value is to be recovered by Chaffee, so that neither the money or the goods, can

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be reached on Lampson's debts. And it is equally clear, they cannot be reached on Chaffee's debts. This, then, has the effect to put the property out of the reach of creditors, and most effectually. And has it any other apparent effect or purpose? Is it not necessary then to refer it to that purpose? Does not the testimony all bear one way? If so, is it not a mere question of law? That is so treated in reference to other subjects. If all the testimony tends to show one state of facts, and none in any conflicting direction, the court may direct a verdict. And if this is the legitimate result of allowing the vendor, in a conditional sale, to hold a lien for the price, as held in *West v. Bolton*, 4 Vt., and other cases following that, I should, for one, incline not to follow them, in this case certainly. I would say as did the philosophers before Torricelli, "nature abhors a vacuum, but not above 32 feet; her abhorrence then ceases;" she stops there; so would I stop here! But I do not think the case bears any analogy to the principles laid down and followed in those cases. There the vendor is allowed to recover, for his own benefit and security, but here virtually for the benefit of the vendee. For who else takes the benefit of this judgment? It is, in my judgment quite idle to attempt to delude ourselves, by the ingenious device these parties have got up for us, and to say, that the plaintiff takes the money recovered here, and Lampson, that which he had deposited as security. It is the recovery of this money, which releases that. The parties were mutually relieved from all obligation to each other, and their accounts balanced, by equal and mutual trusts, until this judgment is realized; and then, Chaffee becomes the debtor to Lampson, for the prior amount of the judgment except the \$4,12. Is it not then true that Lampson derives benefit, and the sole benefit of this judgment beyond the \$4,12? And will the law allow so shallow a subterfuge to distract its vision? This to my apprehension is just such a fancy and subterfuge as may always be expected from fraudulent debtors, and such as it is the business of courts to penetrate and demolish. I should blush for any code of laws that would suffer itself to be hoodwinked, and deluded by such shallow devices; or that would not at once free itself from any entanglements, which the apparent pursuit of its own doctrines, might seem to throw around it, when it became apparent, that the results were so much at variance with acknowledged principles of justice and

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equity. I should myself think the plaintiff could not recover beyond his own equitable interest in the goods, deducting the \$50 and the \$89, the latter sum being on the bill credited as so much *paid*, and it is so denominated, in the bill of exceptions, as so much *paid*, at the time the goods were taken, and we must regard this sum as paid towards the second bill of goods, and therefore, whatever portion of these goods were attached should undoubtedly be regarded as paid for. And the majority of the court concur in this latter view. But a majority of the court think the plaintiff may maintain the action for the balance. The plaintiff may, therefore have his judgment affirmed, deducting the \$89 and interest, and reversed for the remainder, or have the judgment reversed, and remanded for new trial.

FREDERICK CHAFFEE v. PATRICK MALARKEE, & HODGES & OWEN, SUBSEQUENT ATTACHING CREDITORS.

Subsequent attaching creditors, their right of appeal. Auditors to adjust the accounts of the parties to the time of the audit. Plaintiff's lien on property attached.

When subsequent attaching creditors are permitted to enter and defend, in a suit, before a justice of the peace, under the statute, they so far become parties to the suit, that they have the right of appeal, and can prosecute the same in the appellate court.

Auditors by statute, (Comp. Stat. 290 § 9,) are required in taking the account of the parties on book, to examine and adjust the same to the time of the audit; and the plaintiff is also entitled to hold any lien or security that he may have obtained by attachment, for the payment of the balance which he may recover.

And whenever any creditor makes a subsequent attachment of the same property, it is made subject to this duty imposed by statute on the auditor, and also to this right given to the plaintiff to hold the lien or security on the property attached.

The rule would probably be otherwise, if there was actual fraud practised between the plaintiff and defendant, for the purpose of defeating the lien of the subsequent attaching creditors.

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BOOK ACCOUNT. This cause was brought to the county court by appeal, of the subsequent attaching creditors of the defendant, from the judgment of a justice of the peace.

At the September Term, 1853, of the County Court,—**PIER-POINT, J.**, presiding,—the plaintiff moved to dismiss the appeal, on the ground that no appeal could by law be taken by the said subsequent attaching creditors.

The court overruled the motion and adjudged that said Hodges & Owen, as subsequent attaching creditors had the right to appeal, and that said cause was properly in court by their appeal. To this decision and judgment of the court the plaintiff excepted.

The cause was duly sent to an auditor, who reported substantially the following facts:

That upon the hearing before the auditor, the plaintiff and the creditors, Hodges & Owen, appeared at the time and place appointed; but that the defendant, Malarkee, did not appear, and that no defence was made by him to any part of the plaintiff's account. That the creditors admitted all of the plaintiff's account, except the last item for \$48,84, cash lent to defendant, to be correct and properly charged, but objected to the allowance of the said last item. That on the 12th day of January, 1853, the only charges on book, which the plaintiff had against the defendant, consisted of nine items amounting to the sum of \$46,30, and that on said last named day, the plaintiff took out his writ of attachment against said Malarkee, in an action on book, made returnable before a justice of the peace, on the 31st of January, 1853, and that on said 12th day of January, said writ of attachment was duly served by attaching personal property of the said defendant; that on the 13th day of January, 1853, the said Hodges & Owen took out a writ of attachment, in their favor against the defendant, returnable to the April Term of the county court, and on the same 13th day of January, caused said writ to be duly served by attaching the same personal property that was attached on the plaintiff's writ, but subject to the plaintiff's attachment; that the writ of said Hodges & Owen was duly served and entered in court, April Term, 1853; that on said 13th day of January, the defendant was indebted to said Hodges & Owen, in a sum exceeding three hundred dollars, and is still owing about the same sum. That on the said 31st day of January, 1853, the day set for trial in the plaintiff's writ, the de-

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fendant appeared in court before the magistrate and gave judgment by confession for the whole amount of the plaintiff's account, including the charge for money lent, which was under the date of the 17th day of January, 1853. That the said Hodges & Owen appeared at the justice court and were admitted to defend as attaching creditors, and then objected to the allowance of the said last item in the account of \$48,84, for cash lent.

In relation to this item, the auditor found that the plaintiff lent to the defendant, on the 17th day of January, 1853, the sum of money as charged, and that the plaintiff knew at the time that said Hodges & Owen had commenced their suit against the defendant, and had attached the same property that plaintiff had attached; and that plaintiff lent this money to the defendant to pay a certain note that defendant had before that time, and before the service of plaintiff's writ as aforesaid, given to the plaintiff on settlement, which note was payable to the plaintiff or his order at the Bank of Rutland, and fell due on the 26th day of January, 1853; and this note the plaintiff had endorsed over to said Bank; and that he had received the money of the Bank on the same, before the 12th day of January, 1853; that the plaintiff lent and defendant borrowed this money to pay said note, and did pay and take up the same after the said attachment of Hodges & Owen, and before the note fell due, and before the justice court was held; that the personal property so attached had been sold by the sheriff on plaintiff's writ for some fifteen or twenty dollars more than enough to pay plaintiff's account as claimed by him.

Upon the foregoing facts the auditor submitted to the court whether the plaintiff was entitled to recover his whole account including the last item of \$48,84, or the sum due on the 12th day of January, 1853.

The court rendered judgment for the largest sum including the last item in the plaintiff's account. To which decision the said Hodges & Owen, the subsequent attaching creditors excepted.

C. L. Williams for the subsequent attaching creditors.

At the time of Hodges & Owen's attachment, the lien of Chaffee upon the property, by virtue of his prior attachment, was for the sum of \$46,80, only and costs. Had Chaffee's action been one of assumpsit or debt counting specially upon Malarkee's indebted-

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ness to him at the time of commencing his suit, he could not by an amendment or by adding a new count for his additional and subsequent claim, have had a recovery on that without discharging his attachment. See cases cited in Minot's Digest 69.

The object of the statute, (Comp. Stat. 223 § 34,) allowing subsequent attaching creditors to appear and defend, was to enable such creditors to have their rights and interest in the property attached established and enforced in that suit and save the necessity of a resort to chancery or to a suit against the officer.

The loan by Chaffee to Malarkee of \$48,84, on the 17th day of January, 1853, was a virtual fraud upon Hodges & Owen, for it was made with the intent and for the purpose of depriving them of the benefit of the security to that amount, which they had obtained by the attachment of Malarkee's property.

Was the suit appealable by the attaching creditors? The statute, (Comp. Stat. 223 § 34,) was designed to enable the attaching creditor to appear and take all necessary means for defending the action; and there is nothing limiting them to a single hearing, or to the adjudication of *any one tribunal alone*. Under this statute we apprehend the creditors may appeal, review, take exceptions, and all other steps for the defence of the suit, which the defendant himself might have taken had he been disposed. *Adams et al. v. Paige et al.*, 7 Pick. 542, is a full authority for the subsequent attaching creditors upon most of the questions now presented.

R. R. Thrall for plaintiff.

The county court erred in not dismissing the appeal. Comp. Stat. 223 § 34.

There was no fraud in the plaintiff's lending the money charged to Malarkee, to pay the note to the bank upon which plaintiff was liable as endorser. If there was no fraud in lending the money, it was properly charged on book, and it was the duty of the auditor to adjust the accounts up to the time of the audit. *Pratt v. Gallup*, 7 Vt. 344. *Sargent v. Pettebone*, 11 Vt. 355. *Worden v. Johnson*, 11 Vt. 455. *Wing v. Hurlburt*, 15 Vt. 507. Comp. Stat. 290 § 9.

The opinion of the court was delivered by

ISHAM, J. The motion to dismiss in this case was properly

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overruled. The statute is express in its provisions, that "when-
"ever a subsequent attaching creditor of real, or personal prop-
"erty, shall wish to contest the validity of the debt or claim on
"which a previous attachment is founded, the court in their dis-
"cretion, may permit such creditor to appear and defend the suit."
To deprive a creditor who has thus appeared, of a right of appeal,
would defeat the general object for which the act was passed. As
the legislature imposed no restriction of that character, it is rea-
sonable to presume, that they intended to give the creditor the en-
joyment of those means and opportunities for the prosecution of
his defence, which are given to the defendant. The right of ap-
peal may properly be considered as an incident to the right of ap-
pearing and defending suits at law; and when the general right to
defend is granted, those incidents follow which are given to the
defendant, and which direct the manner in which a defence may
be interposed. We think, therefore, that the appeal was properly
taken by the subsequent attaching creditors, and that they are so
far parties to the suit, that they can prosecute the same in the ap-
pellate court.

We think also, that the judgment of the county court must be
affirmed, on the exceptions taken to the report of the auditor.
The 9th section of the Comp. Stat. 290, directs the auditor in tak-
ing the account of the parties on book, to examine and adjust the
same to the time of the audit. It is a right also given to the plain-
tiff by the statute, to have his account so adjusted, and to hold any
lien or security he may have obtained by his attachment, for the
payment of the balance which he may recover. It is not within
the legitimate power of any court to deprive a party of a specific
right so expressly secured by statute, or defeat the intention of the
legislature, so unequivocally spread on the face of the act. When-
ever another creditor makes a subsequent attachment of the same
property, it is done subject to this duty imposed on the auditor,
and subject to this right given to the plaintiff. The attachment
was made with a knowledge of this right, and with the understand-
ing that the plaintiff's account was to be so adjusted and allowed.
If the account is just and due, and the subsequent charges were
made in the regular course of their business transactions, there is
nothing of which the subsequent attaching creditor has reason to
complain. If there was actual fraud practiced between the plain-

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tiff and defendant, for the purpose of defeating the lien of the subsequent attaching creditors, the rule would probably be otherwise, and the lien of the plaintiff would probably thereby be defeated, as against the last attachment. But no suggestions of that character have been made; and none, but that the account of the plaintiff is just and due, and which would have accrued, if this attachment had not been made. Under such circumstances, the plaintiff is entitled under the statute to a judgment on the balance of his account, as it stood, at the time of the hearing before the auditor.

WILLIAM KIMBALL v. RUTLAND & BURLINGTON RAILROAD
COMPANY.

Carriers by Railway. Limitation of Liability. Notice. Special Contract, its effect. Declaration.

A Railway Company that transport cattle and live stock for hire, for such persons as choose to employ them, thereby assume and take upon themselves the relation of common carriers, and with the relation, the duties and obligations which grow out of it; and they are none the less common carriers from the fact, that the transportation of cattle is not their principal business or employment.

A common carrier may by special contract with the owner of the property to be transported, so change his relation, as to become a private carrier, and when the relation is so changed, his liability is measured by the specific provisions of his contract; but a general notice to the public, limiting his obligations as a common carrier, will afford no evidence of such contract, even if the existence and contents of such notice is brought home to the party.

And where a Railway Company, (the defendants,) for a given reward or hire, proffered to become, and to assume the relation of common carriers; and for a less reward or hire proffered, in the exercise of reasonable care, to furnish the necessary means of transportation, such as cars, motive power, &c., that the owner might be his own carrier; thus graduating the rate of compensation to the degree of risk assumed, and leaving either mode of transportation to be adopted at the option of the owner of the stock; and the plaintiff, who had cattle to be transported, elected to pay the lower rate—*held*—that he was bound by his election, and that he could not hold the company as common carriers, for damage to his cattle.

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In the present case, a special contract was found, under which the defendants, in the exercise of reasonable care, were to furnish the plaintiff with a suitable car, and other necessary means of transportation, and the plaintiff was to assume the risk, and general responsibility of the transportation of his cattle—*held*—under this contract, that the defendants were not common carriers, but were *pro hac vice* private carriers merely.

And the plaintiff having declared against the defendants as common carriers, the question whether such a special contract was made, is purely one of law.

And when the relation is changed from common to private carriers by special contract, the company not being liable as common carriers, cannot be declared against as such, but the action must be on the contract, or for a breach of duty arising out of the contract.

ACTION ON THE CASE against the defendants as common carriers. This case was originally commenced before a justice of the peace, and was brought to the county court by appeal.

The declaration was as follows :

“ In a plea of the case, whereupon the plaintiff declares and says, that on the 11th day of November, A. D. 1851, the defendants were, and ever since have been, and still are common carriers of goods for hire, from Burlington, Vermont, and intermediate stations on the Rutland & Burlington Railroad, between that place and Bellows Falls, Vermont, to Cambridge or a station called Porters, in the state of Massachusetts, and that the plaintiff, on the day and year last aforesaid, at said Brandon,—there being an intermediate station as aforesaid at said Brandon,—caused to be delivered to them, the defendants, and the defendants accepted and received of and from the plaintiff, a certain number of neat cattle, to wit, cows, oxen, yearlings, and two year old cattle, to the number of thirty-one, and to the amount of thirteen thousand three hundred and thirty pounds weight, belonging to the plaintiff, of the value of five hundred dollars, to be safely and securely freighted, carried and conveyed by them, the defendants, from Brandon aforesaid, to Cambridge or Porters aforesaid, for a certain reasonable reward, to be paid by the plaintiff to them, the defendants. Yet the defendants, not regarding their duty as common carriers, as aforesaid, but contriving and intending to injure the plaintiff, did not and would not safely and securely freight, carry or convey said cattle from Brandon aforesaid, to Cambridge or Porters aforesaid, nor there at said Cam-

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“bridge or Porters safely or securely deliver the same, to him, the plaintiff, but on the contrary thereof, the defendants so carelessly and negligently behaved and conducted in the premises, that by reason of their said negligence, carelessness and default, divers, to wit, to the number of five of said cattle, of the value of ninety dollars, were killed, and wholly lost to the plaintiff, and the remainder thereof were so greatly injured, that by reason thereof they were then and there greatly lessened and depreciated in value, and by reason of the premises, also, the plaintiff was put to great trouble, and subjected to loss of time, to wit, to ten days time; and paid out divers large sums of money in doctoring and taking care of said cattle, of all which the said defendants had due notice.”

Plea, the general issue, and trial by jury.

On the trial the plaintiff was examined as a witness, and stated that he made a contract with the agent of the defendants, for the use of a car to convey cattle from Brandon, Vermont, to Porters, (Cambridge,) Mass.; and that he was to have the same privileges as others had, agreeably to the freight tariff published by the defendants, which was as follows: *“LIVE STOCK will be reckoned at 2d class rates, according to the tonnage specified below.”*

“One OX, $1\frac{1}{2}$ tons; 2 Oxen, 2 tons; 3 Oxen $2\frac{1}{2}$ tons; and over 3 Cattle, 1 ton each, or $6\frac{3}{4}$ tons per car load of 8 wheels; $3\frac{1}{2}$ tons per car load of 4 wheels.

“One HORSE $1\frac{3}{4}$ tons; 2 horses $2\frac{1}{2}$ tons; and over 2 horses, 1 ton each, or $6\frac{1}{4}$ tons per car load of 8 wheels, and in all cases to be accompanied by the consignee.


“SHEEP, SHOATS and CALVES, 5 tons per car load of 8 wheels; and $2\frac{3}{4}$ tons per car-load of 4 wheels; less than car load of four wheels 150 lbs. each.

“At these rates, the owners are to load, unload, and feed their stock, at their own expense and risk, and assume all risk that animals may cause to each other or themselves or damage in consequence of their breaking from the cars or otherwise. No risk will be assumed by the corporation nor damage allowed, unless especially agreed to, when the animals are taken for transportation, and an additional price of 25 per cent upon tariff rates paid. One driver free, when accompanying his stock, to take care of it, and paying the regular price as per tariff; and in no

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"case will he be allowed to ride in the passenger train, without paying regular fare.

"A ticket will be furnished each drover, or person entitled to a free pass on the freight train, for the sole purpose of taking care of his stock, by the agent of the station where the stock is loaded; and the conductors of freight trains will observe this, and be governed accordingly. No risk will be assumed by the corporation for the personal safety of such person.

" The Charges upon live stock going to Porters, by cattle trains, must in all cases be prepaid."

And also agreeably to the ticket which was delivered to the plaintiff, by the said agent, which ticket gave the plaintiff a free pass on the freight train for that trip, and on the back of the said ticket was the following. "At the rates charged as per tariff, no risk will be assumed by the corporation for any injury to live stock which they may do each other or themselves, or any damage caused by breaking from the cars or otherwise. Nor will they hold themselves liable for damage caused by accidental delays or weather; but the corporation will use all reasonable care and diligence.

"By paying 25 per cent advance upon tariff rates, the corporation will assume the responsibility of safely delivering live stock at its destination or the station where way-billed.

"One driver free for each drove or each lot of stock, when paying full price, according to the rates of transportation, and for the sole purpose of taking care of the stock; but no risk will be assumed by the corporation for his personal safety.

"Transportation Office, R. & B. R. R. Co., June, 1851."

(Copies of the said tariff and ticket, as above recited, were put into the case.)

The plaintiff also testified, that he was to put into the car as many cattle as he pleased; and that he put in thirty head of young cattle, two and one years old of his own, and then a cow of one Spaulding, making thirty-one cattle; that there was in the cattle train a car appropriated for the use of those having the care of the cattle on board, in which the plaintiff rode; that he saw his cattle at Pittsford, and Rutland, and again at Chester, and that they were then in good condition, that he did not see them again till he arrived at Porters; that the car in which the plain-

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tiff rode, was in the rear, and his cattle were in the forward part of the train; and that between Chester and Bellows Falls, the train was separated, and afterwards continued in two trains until they arrived at Porters; that in consequence thereof, the plaintiff was unable to have any care of his cattle after they left Chester; that when the cattle arrived at Porters, they were in a very bad condition, several were down and unable to get up, and four others were dead.

It appeared, that the plaintiff did not put any straw or gravel in the car before putting in the cattle, which, the evidence tended to show was generally done, by those having cattle transported upon the railroad. The plaintiff testified that he never had any cattle transported by railroad before. There was no evidence tending to show, that the plaintiff's cattle had received any injury in the car, except what was occasioned by their struggling and slipping in the car, and such as was inflicted by the cattle upon each other.

The plaintiff contended, and requested the court to charge the jury, that if by reason of the separation of the train, the plaintiff was prevented from having that oversight and care of his cattle that he otherwise would have done, (and which was contemplated by the tariff and ticket aforesaid,) and thereby avoiding the injury to the cattle, the defendants were liable for the damages the plaintiff had sustained by such injury.

But the court,—PIERPOINT, J., presiding,—intimated to the plaintiff's counsel, that the jury would be instructed that if they found all the facts, which the evidence tended to prove, and that the damages sustained were sustained solely by the separation of the train as aforesaid, and injuries inflicted by the cattle on themselves or each other, that the verdict of the jury should be for the defendants.

Whereupon the plaintiff submitted to a non-suit, with leave to move to set aside the non-suit, if the ruling of the court is erroneous. And upon motion the court refused to set aside the non-suit.

To which decision the plaintiff excepted.

Parker & Nicholson for the plaintiff.

I. That the injury complained of was the result of culpable

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negligence on the part of the defendants or their servants is not questioned; and that the plaintiff ought to have some remedy is conceded. The defect, if any exists, is in the pleadings, and does not reach the merits of the controversy.

Are the defendants liable in the capacity in which they are charged, to answer in damages for the injury which the plaintiff has sustained?

It is conceded, that in the absence of any special restrictions, either by notice or contract, the defendants would have been bound as common carriers, to exercise at least a reasonable degree of care, over the property entrusted to their charge. How far they may be permitted to claim exemption from this obligation in consequence of such restrictions, remains to be determined.

II. As to how far a common carrier may restrict his common law liability by a general notice, the decisions have been somewhat contradictory and conflicting. In this country the current of authority is, that he cannot do so, even when the notice is brought home to the knowledge of the owner. 1 Smith's Lead. Cas. 235, 236. 7 Wels. Hurls. & Gor. 716, *note*, and authorities there cited.

That he may do so by special contract with the party to be affected by it, many approved authorities affirm. But this contract, like all others, must be founded upon a good and sufficient consideration. Such consideration cannot be found in the carriage of the property, for this is a primary obligation that the law imposes upon the carrier; and he cannot make the performance of one part of his duty the means of obtaining exoneration from the rest. 7 Wels. Hurls. & Gor. 716, *note*. *Cole v. Goodwin*, 19 Wend. 252. *Atwood v. Reliance Trans. Co.*, 9 Watts 87.

III. It is believed that there is no well adjudged case in this country, that has gone to the length of deciding that the carrier can stipulate against the consequences of his own default, or throw a loss occasioned by his own misfeasance or negligence, upon those who have entrusted their property to his care. The courts have held, that if such a stipulation was intended by the parties, it would be contrary to public policy and void. *Camden v. Burke*, 13 Wend. 611. *Beckman v. Shouse*, 5 Rawle 179. *Alexander v. Green*, 7 Hill 583. *Singleton v. Hilliard*, 1 Strob. 203. *Swindler v. Hilliard*, 2 Rich. 286. 66 E. C. L. 352.

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IV. The contract in this case, if of any validity in law, does not *destroy* the defendants' liability. It is a mere *limitation* or *restriction*, and by the express terms of the contract, the defendants were bound "*to use all reasonable care and diligence.*" The court below, therefore, erred in refusing to permit the jury to find whether the injury complained of did not arise from the want of such "reasonable care and diligence" on the part of the defendants.

V. The only consideration for the contract restricting the defendants' liability, that has any apparent validity, is the agreement of defendants to permit the plaintiff to accompany his stock, for the purpose of exercising that care over it which it would otherwise have been their duty to exercise.

Therefore, when defendants, by their own act or neglect, render this consideration absolutely inoperative, and refuse to permit the plaintiff to accompany his stock, that moment they have forfeited the provisions of their contract, and cannot claim any exemption from liability under it; the plaintiff is at liberty at once to repudiate it, and to throw the defendants back upon their original common law liability, as if no restriction in contract had ever existed.

E. N. Briggs for defendants.

I. It may be inferred that a Railroad Company doing business is a common carrier of passengers, baggage and freight; but it does not follow that they are common carriers of everything.

It is not true that railroads are common carriers of cattle and horses. But the usage is universally to the contrary.

II. Upon the evidence introduced by the plaintiff, it was not claimed that the defendants were liable as common carriers, but by reason of the separation of the trains, by which plaintiff had not the care and oversight of his cattle.

The court decided that the plaintiff was not entitled to recover for this reason, as that was not what plaintiff claimed in his declaration.

But if the declaration was according to the evidence in the case, the plaintiff is not entitled to recover. The evidence shows that the defendants were not common carriers in this case. The plaintiff hired of the defendants a car to be drawn by the defendants to Cambridge.

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A special contract was made, as is shown by the ticket delivered to the plaintiff. Under this contract, defendants were not liable for any loss or damage to plaintiff's cattle. *Chippendale v. Lancaster & York Railway Co.*, 11 Amer. Law Journal 397. *Shaw v. York & Midland Railway Co.*, 66 Com. Law Rep. 345, notes. *Austin v. Manchester Railway Co.*, 70 C. L. Rep. 453.

Common carriers may limit their common law responsibility by special contract. 70 C. L. R. note 474. Story on Bailments 549. *Bingham v. Rogers*, 6 Watt & Sergt. 495. Angell on Com. Car. 245, 247, 232. Walford on Railways 308.

The opinion of the court was delivered by

ISHAM, J. The declaration in this case is in the usual form against common carriers; in which it is averred, that the defendants received of the plaintiff several head of cattle, to be safely conveyed by railway from Brandon, in this state, to Cambridge, in the state of Massachusetts. The question arises, whether upon the facts stated in the exceptions, the declaration is sustained by proof that the cattle were transported by the defendants as common carriers, or whether a special contract was made creating other liabilities, than those upon which the plaintiff has declared.

From the ticket which was delivered to the plaintiff, as well as from the published tariff of freight, which is made part of the case, we perceive that this Railroad Company have adopted two different methods, with different rates of compensation, for the transportation of live stock over this road. In the first place, they have assumed the duties and responsibilities of common carriers; for they distinctly say, that on the payment of 25 per cent advance upon tariff rates, they will safely transport and deliver property of this character at its place of destination, or the station where way-billed. In the next place, if the owner wishes the transportation effected at a less remuneration, they as distinctly state, that on the payment of tariff rates, they will furnish for that purpose, the use of their road, provide suitable cars, and sufficient motive power, so that the stock may be transported at the owner's risk, and on his own responsibility. In short—for a given reward, they proffer to become his carrier; for a less reward, they proffer to furnish the necessary means, that the owner may be his own carrier. Thus in each case, the defendants have graduated their

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rate of compensation, to the degree of risk they have assumed; and either mode of transportation, may be adopted at the option of the owner of the stock. X

If the owner requests his cattle to be transported by the defendants as common carriers, he has only to pay a reasonable compensation for that purpose, and refuse to enter into any special contract for their carriage on any other terms. In that event, they are responsible for their safe carriage and delivery. It was so held by PARKE, B., in *Carr v. The Lancashire Railway Company*, 14 E. Law & Eq. 340. It is immaterial, whether transportation of cattle is regarded as their principal employment, or whether it is incidental and subordinate; the fact that they have undertaken such transportation for hire, and for such persons as choose to employ them, establishes their relation as common carriers, and with it the duties and obligations which grow out of it. These general principles have been frequently applied to railroad corporations in England and this country, and they have clearly the right to exercise that corporate franchise where they have power under their charter to transport both "*persons and property*." Charter Act 1843 § 1. 1 Smith's Lead. Cas. 260, 268. Angell on Car. § 78, 109. Walf. on Railways 309 and note, (g.) *Palmer v. Grand Junction R. R. Co.*, 4 M. & W. 449.

We are satisfied that the defendants would be liable as common carriers, and that this case should have been submitted to the jury on this declaration, unless a different relation exists, and different liabilities have been incurred, by some express contract or agreement made between these parties.

The right of these defendants as common carriers to make an express agreement, and thereby change their relation, and subject themselves to different liabilities, is clearly sustained by authorities both English and American. It is unnecessary to refer to all the cases in England, in which this subject has been considered; it is sufficient to notice the late case of *Carr v. The Lancashire Railway Company*, 14 E. Law & Eq. 340, where the various cases are considered, and in which Baron PARKE observed, "That before railways were in use, the articles conveyed were of a different description from what they are now. Sheep and other live animals are now carried upon railways. Contracts, therefore, are now made with reference to the new state of things,

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"and it is very reasonable that carriers should be allowed to make agreements for the purpose of protecting themselves against the new risks, to which they are in modern times exposed. The rapid motion and noise of the engine, with various other matters, are apt to alarm them, and cause them to do injuries to themselves. It is reasonable, therefore, that carriers should protect themselves against loss by making special contracts." The authorities in this country are quite uniform, in adopting the same view of this subject. In the case of *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard 344, the court remarked; "That a question has been made whether it is competent for the carrier to restrict his obligation even by a special agreement; but we are unable to perceive any well founded objection to the restriction, or any stronger reasons forbidding it, than exist in the case of any insurer of goods. But it by no means follows that he can do so by any act of his own. He has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. This is not to be implied, or inferred from a general notice to the public limiting his obligation." In the cases of *Hollister v. Nowland*, 19 Wend. 240, *Cole v. Goodwin*, ibid 272, and *Gould v. Hill*, 2 Hill 508, it was held in New York that a carrier could not limit his liability, either by notice, though brought to the knowledge of the party, nor by a special agreement; and this doctrine is also sustained by Messrs. Hare and Wallace in their notes to the case of *Coggs v. Bernard*, 1 Smith's Lead. Cas. 280. But since the decision in the 6 Howard R. the courts in that state, in the cases of *Parsons v. Monteith*, 13 Barb. S. C. 358, and *Moore v. Evans*, 14 Barb. 624, have receded from the doctrine of those former cases, so far as it respects the competency of a carrier to make a special agreement, and have adopted the views of the U. S. Supreme Court as expressed in the 6 Howard. The rule is regarded, therefore, not only sound in principle, but sustained by authority, that a common carrier may, by an express contract, or agreement with the owner, so vary and change his relation, as to become a private carrier. In that event his liability in the transportation of that property is measured by the specific provisions of his contract; but a general notice to the public, limiting his obligation as such carrier, will afford no evidence of such contract,

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either express or implied, though the existence and contents of that notice, are brought home to the actual knowledge of the party. The implication is as strong, that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification.

Was such an express contract, or agreement, made in this case, in relation to the transportation of these cattle? It is necessary to determine this question, for it is purely one of law. It was so treated by the county court when they ruled, "That if the jury found all the facts to be true which the evidence tended to prove, their verdict should be for the defendants." This question was held to be one of law merely, in the late case in the English courts, of *York, Newcastle & Berwick Railway Co. v. Crisp*, 23 L. J. 125. Law Register for August 1854. In that case the question arose whether the defendants were common carriers, or whether the cattle were received under a special contract, on the terms contained in a ticket which was delivered to the owner of the cattle. The matter was submitted to the jury. Exceptions being taken, the court of common Bench observed: "That the judge who tried the case was guilty of a misdirection in leaving it to the jury to say whether the defendants were common carriers of cattle for hire, or whether they were received under a special contract; and that he ought to have told the jury, that there was either a special contract, or no contract at all." There was no error, therefore, in this case, in the disposition of that question by the court, as a matter of law. We are satisfied also, that the court were correct in ruling that an express contract was made by the parties, for the transportation of these cattle.

Whether the defendants would have been liable as common carriers, if they had refused to transport these cattle except on the terms of an agreement exonerating them from all liability, or restricting their common law responsibility, we are not called upon definitely to decide. It cannot be said in truth, that a voluntary contract was made, where the terms are imposed by one, and the other has no power to repel them. In *Noyes' Maxims* ch. 48, p. 110, it is said, "That if a carrier refuse to carry unless a promise were made to him, that he shall not be charged with any such misdemeanor, that promise is void;" and this doctrine is approved of, by Ch. J. Best in *Newborn v. Just*, 2 C. & P. 76, and in the notes

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of Messrs. Hare and Wallace, 1 Smith's Lead. Cas. 279. These defendants, however, did not refuse, on the payment of 25 per cent, advance on tariff rates, to receive and transport these cattle as common carriers, and at their risk; and that reward must be considered as reasonable, as no suggestions are made to the contrary. It is for the benefit and advantage of owners of live stock, that a special agreement may be made, that on the payment of a less sum, they may become their own carriers, and have furnished for them the necessary means for that purpose.

When this plaintiff, therefore, chose not to pay the required compensation to have his cattle transported by the defendants as common carriers, and at their risk, but elected to pay the lower rate, it is reasonable that he should be bound by his own election. In addition to this, the plaintiff states, that he made a contract for the *use of a car*, and was to have the same privileges as others had, *agreeable to the freight tariff*. For that privilege only did he make application; and for that only did he pay. It would be unreasonable, therefore, that the plaintiff should now hold the defendants responsible as common carriers, and charge them with a risk and responsibility, which they were not requested to assume, and for which they were never paid. We think the matter very clear, that a special contract was made, in respect to the transportation of these cattle; under which, the defendants, in the exercise of reasonable care, were to furnish the plaintiff with a suitable car, and other necessary means for transportation; and the plaintiff was to assume the risk, and general responsibility of their transportation.

The remaining question arises, whether, if that special contract has been broken, and damages thereby sustained in the transportation of the cattle, a recovery can be had in this case, under this declaration. In actions on the case, in form *ex delicto*, where the obligation of the defendant consists in the observance of some *particular duty*, the declaration must state the nature of that duty; and where the duty arises from some *particular relation or character* in which the defendant stands, that relation or character should be stated; and if in either of these particulars, the duty or relation as stated is different from that which is proved, the variance is fatal. 1 Chitty on Plea. 869. The defendants are charged in the declaration as common carriers, upon whom *the law casts the*

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duty of safely transporting and delivering the property at its place of destination, unless prevented by the act of God, the public enemies, or the fault of the party complaining. For that reason the liability arising from the relation of common carriers cannot be changed by any act of their own. Under the express contract which is proved in this case, the defendants were not common carriers; but were *pro hac vice* private carriers merely. Their obligations and duties arose from contract, and therefore may be modified by contract. In the case from the 6 Howard, Justice Nelson observed: "That the owner by entering into a contract virtually agrees, that in that *particular transaction the carrier is not to be regarded as in the exercise of his public employment*; but "as a private person, who incurs no responsibility beyond that of "an ordinary bailee for hire, and answerable only for misconduct "or negligence." The same doctrine is sustained in the cases of *Parsons v. Monteith*, 13 Barb. 358, *Moore v. Evans*, 14 Barb. 524. Angell on carriers § 46, 54, 59. It is quite obvious in this case, that the duties and relation assumed by the defendants under this contract are different, and vary from that with which they are charged in this declaration. The terms of the agreement do not simply affect the damages to be recovered, or create obligations consistent with the relation of common carriers, as was the case of *Clark v. Gray*, 6 East. 564, but they extend to the obligation of the contract itself. Their relation is changed from that of common carriers to private carriers; and where such is the effect of their special agreement, they are not liable as common carriers, neither can they be declared against as such. It is possible, that there has been a breach of that express contract, and the plaintiff is, perhaps, entitled to damages for the injuries he has sustained; but the action should have been brought on that contract, or for a breach of duty arising out of it, and not on the duty and obligation imposed on common carriers. This matter has been directly decided in the cases of *Shaw v. York & Midland Railway Co.*, 66 Com. Law 345, and *Austin v. The Manchester &c. Railway Co.*, 5 E. Law & Eq. 329. In the last case PATTERSON J. remarked, "that if the declaration is founded upon the liability of the defendants at common law, it is disproved, as the evidence shows they "were liable not as common carriers, but under a special contract," and for that reason he observed, "I am of opinion that there is a

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"variance, and that the rule must be discharged." In this opinion, COLERIDGE, WIGHTMAN, and EARLE, Justices, agreed. For the same reason, therefore, we think the judgment of the County Court in this case must be affirmed.

PHILO D. HART & OTHERS v. ISHAM WHITE.

Wills. The construction of Wills.

Where the testator, in his will, in devising a portion of his estate to his wife, made the bequest in the following words; "I give to my beloved wife one third of all "my personal and real estate, and in addition to that, I give her one cow, ten "sheep, and one hundred dollars in money, to have at her disposal during her "natural life, or so long as she shall remain my widow;" *it was held,*

- I. That the two parts in this item in the testator's will, are distinct and each complete in itself.
- II. That the first clause in this item gives to the wife of the testator an estate in fee.
- III. That the second clause does not influence or control the first, but the second clause being independent and distinct, it gives to the wife a life estate in the articles specified, in way of addition to the first clause in the bequest, with power of sale.

The word *estate*, used in a will in its application to real property, may be used to express either the quantity of interest devised, or to designate the thing devised, or both; and the sense in which it is used must be determined from the will itself.

THIS was an appeal by the plaintiffs from a decree of the probate court, denying the petition of the plaintiffs, praying for an order of division of the estate of Coolidge White, deceased, which was devised to Betsey White, his widow, deceased, for the term of her life, as the plaintiffs claimed, now terminated.

The will was as follows, to wit:

"I, Coolidge White, of Wallingford, in the county of Rutland, "and State of Vermont, being in a very infirm state of health, am "sensible of my liability to sudden death, at the same time be-

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"ing in my own apprehension of sound mind, do judge it best to
"make, and accordingly do make, hereby, this my last will and
"testament.

"It is my will that all my just debts, and the charges of my
"funeral be paid by my executor hereinafter named and appointed,
"out of my estate, as soon as conveniently may be after my decease,
"and I leave the charge of my funeral to the direction of my said
"executor. I give, devise, and dispose of all my estate, real and
"personal, save what shall be necessary for the payment of my
"just debts and funeral charges, in the following manner :

"I give to my beloved wife, one third part of all my real and
"personal estate, and in addition to that, I give her one cow, ten
"sheep, and one hundred dollars in money, to have at her disposal
"during her natural life, or so long as she shall remain my widow ;
"and it is my will that the remainder of my property be divided
"among my children, in the following manner, that is as often as
"the males have three dollars, the females have two dollars, all to
"share alike in that proportion. I have given to my daughter,
"Almira Hart, and her heirs, real estate to the amount of three
"hundred dollars, which is to be deducted from her portion. The
"household furniture that my daughters, Almira Hart, Betsey
"Barnes, and Miranda Chilson have had, I also give them ; and I
"hereby appoint my son Isham White, sole executor of my last
"will and testament, hereby revoking all former wills by me made.
"In witness, &c."

The defendant pleaded six several pleas in bar. In the first plea, the defendant set forth, that the whole estate, and the fee simple of the said estate so devised to the said Betsey White, was devised to the said Betsey and her heirs forever, and that the said appellants have no interest, or estate therein under the said will. The second plea sets forth the will at length, and the probate of the same. The third plea refers to the will set forth in the second plea, and sets forth that the said Betsey, while in full life, and being still unmarried, and the widow of the said Coolidge White, did at Wallingford, on the 27th day of November, 1841, by her deed of that date, executed in due form of law, remise, release and quitclaim, unto the said Isham White, his heirs and assigns, the said real estate, so devised and bequeathed to her by the said Coolidge, &c. The fourth plea set forth that the said Isham, on the first

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Monday of June, 1846, having given due notice, rendered an account of his administration upon the estate of the said Coolidge, deceased, and that upon the application of the said appellants said Isham was ordered and decreed, by the probate court, to charge himself, with one third part of the personal estate, together with the real estate so bequeathed to the said Betsey; and that the said Isham appealed from the said order and decree to the county court, for the county of Rutland; that it was ordered by said court, at the April Term, 1847, with the consent of the parties, that said cause be referred to the Hon. Charles K. Williams, and that the parties duly appeared before said referee, on the 6th day of August, 1847; and that after hearing their respective proofs &c. the said referee decided, that the said Betsey acquired under the will of said Coolidge an absolute property in the one third part of the personal property so bequeathed to her, and that the said Isham should not be charged with the same upon his accounting; that said referee made and returned his report accordingly to the county court, and the said court accepted the same, and that the said appellants filed exceptions to the said decision accepting said report, and removed said cause to the Supreme Court, in said county, and that said court affirmed the judgment of the county court, &c.

The fifth plea set forth, that said Isham was charged with the real estate upon the settlement of his administration account, as alleged in the fourth plea, by the order of the probate court, it being the same that had been purchased by the said Isham of the said Betsey, the said Betsey having deceased, that he appealed from said order to the county court, for the county of Rutland, and that said cause by the consent of the several parties was referred to Hon. Charles K. Williams; that the parties duly appeared before said referee; that said appellees, (the appellants in this suit,) claimed that said Isham should be charged with the rents of the said real estate, so devised to the said Betsey, the same having been occupied by the said Isham since her decease, and with the personal property so bequeathed to her &c., and that said referee decided and determined that said Betsey took, under the said will, an absolute and unqualified estate and property, in the said real estate and personal property, and made his report to the county court, and that said report was accepted by said court, and said appellees excepted to said decision of the county court, and the

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said cause was removed to the Supreme Court, for said county of Rutland, and that said judgment and decision of the said county court was affirmed by the Supreme Court &c. The sixth plea set forth, that said appellants ought not to have an order for the division of said real estate &c., because said Isham says, that at a probate court holden for the District of Rutland, on the first Monday of June, 1846, due notice having been given &c., he rendered an account of his administering upon said estate, and it was ordered by said probate court, that he should be charged with certain moneys on said accounting, and that there was a balance due thereon from the said Isham; and that said Isham appealed from said order, to the county court, for the county of Rutland; that at the September Term, 1847, it was considered that a balance was due said Isham for the expenses of administering upon said estate, of \$40.08, and that said appellees filed exceptions to the said decision of the county court, and said cause was removed to the Supreme Court for said county, and that the judgment and decision of the county court was affirmed by the Supreme Court; and that said judgment remains in full force, not vacated nor satisfied, and the same was certified to the said probate court, before the said order of division was applied for, to wit, on the 15th day of March, 1849, all which appears by the records &c.; and that there is not personal property of the said estate sufficient to pay the said balance, neither have the heirs of said estate, nor any one in their behalf, ever paid the same or indemnified the said Isham &c.

The appellants filed their replication to the first and sixth pleas of the defendant, and demurred to the defendants second, third and fourth pleas, and a replication by way of traverse to the defendant's fifth plea.

The defendant demurred to the appellants replications to the first and sixth pleas, and joined issue as to the appellants replication to the fifth plea.

On the hearing of the demurrers, at the September Term, 1853, of the county court,—Peck, J., presiding,—the court adjudged the replications to the first and sixth pleas sufficient, and the second, third and fourth pleas insufficient, and that the matters set forth in the sixth plea in connection with the matters appearing in the replication thereto are no bar to a judgment that partition be made, and to an order that certificate be granted to the effect that parti-

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tion be made, on the appellants paying or securing by bond, under an order of the probate court; agreeable to the statute, whatever sum may be found due the executor from the estate, on or after the filing of such certificate in the probate court; such payment to be made or security given, on or after filing such certificate.

Exceptions by defendant.

On the trial at the same Term, upon the issue joined upon the fifth plea, the defendant offered in evidence a certified copy of the proceedings referred to in said plea, with the order of reference, the referee's report &c.

The defendant also offered parol testimony, for the purpose of showing that the parties referred to in said fifth plea, were the same as in the present proceedings, and that at the time of said reference, and at the hearing and trial before the referee, the parties had the same controversy then as now, respecting the right and interest that the said Betsey White took, to the real as well as the personal estate given to her, by the will of said Coolidge White &c.

The appellants conceded the identity of the parties in the two proceedings, but objected to the introduction of parol testimony for any other purpose, and claimed that the foregoing facts offered to be proved, should only be shown by the report of the referee.

The objection to the parol testimony was *pro forma* sustained, and said testimony excluded for any other purpose except to show the identity of the parties to the present suit, with those in the proceeding referred to in said fifth plea, and in the certified copies introduced, which identity was conceded, and thereupon a judgment was *pro forma* rendered for the appellants on said fifth plea. Exceptions by defendant.

Upon the whole case, the court rendered judgment that the appellants are entitled to the partition prayed for, upon their paying or securing by a bond, under an order of the probate court, agreeably to the statute, whatever sum is or may be found due the executor from the estate, and ordered that this judgment be certified to the probate court, unless the cause be taken to the Supreme Court upon the exceptions. The court also rendered judgment for the appellants to recover their costs.

Exceptions by defendant.

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(It is not deemed necessary to report more explicitly the pleas in the case, as the cause was decided upon the construction of the will, and many of the questions raised by the pleadings and decided by the court below, were not passed upon by this court.)

S. H. Hodges and *H. Button* for defendant.

The will, upon a proper construction, vested the fee of the premises in Betsey White.

1. It will not be denied that the words of the first clause of the devise in question, are sufficient to carry a fee. This clause constitutes a perfect sentence in itself, having all the parts necessary. It is separated from the subsequent clause, and the words of qualification, upon which the appellants rely, by the conjunctive phrase, "in addition thereto," which emphatically marks the introduction of a new subject and a new action. The subsequent clause is also a perfect sentence, removing all pretext for connecting the two.—The absence of any words of limitation in the first clause, though striking to a professional ear, would not seem singular to a layman. We insist, in fine, that the laws of the English tongue, and the natural construction of the expressions here used, conspire in limiting the operation of the words of qualification in the second clause, to the property there designated. *Ellem v. Westley*, 4 B. & C. 667. *Areson v. Areson*. 5 Hill 410.

2. The words "at her disposal during her natural life," if applicable to this property, would also vest a fee in Mrs. White, there being nothing in the devise clearly indicative of a contrary intention. *Tomlinson v. Dighton*, 1 P. Wms. 149, and cases there cited. 1 Sugden on Powers 119. *Pearson v. Otway*, 2 Wils. 6.

3. It is idle to suppose that the testator contemplated a different disposition of his real and personal estate, or that he would leave his widow less than she could obtain by law, especially at her age and after their children were settled.

4. The statute (Comp. Stat. Chap. 48 § 3,) expressly requires, that in cases of doubt, such as the court has held this to be, the devise should be construed to convey a fee, 21 Vt. 250.

If the words "to be at her disposal," do not vest a fee, they confer a power, which has been well executed. *Tomlinson v. Dighton*, 1 P. Wms. 149, and cases there cited. *Sillars v. Robinson*, 3 U. S. D. 678. 1 Sugden on Powers 119, &c.

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C. L. Williams and *D. E. Nicholson* for appellants.

The issues raised upon the 1, 2 and 3 pleas present the question as to the construction of that part of the will, which is in these words, "I give to my beloved wife one third part of all my real and personal estate, and in addition to that, I give her one cow, ten sheep, and one hundred dollars in money, to have at her disposal during her natural life, or as long as she remains my widow."

The real intention of the testator, in making the above devise is to govern in its construction, if that intention can be ascertained. REDFIELD, J. in *White v. White*, 21 Vt. 250. 4 Kent's Com. 596.

The testator obviously intended that his widow should have a life interest either in the whole, or in a part of the property devised. If only a part, which part? We say the real estate, and for the following reasons:

The real estate was the property of which the use merely would be the more beneficial to the widow; the property in which life estates are more usually given; the property in reference to which there has never been any question but that a mere life estate in it might be given; and the property in which the widow would by law have had a mere life estate, if no will had been made.

A life estate merely in real estate is ordinarily supposed to be conveyed, unless an intention to convey the fee is clearly expressed. REDFIELD, J. in *White v. White*, 21 Vt.

As to the construction to be given to the word "estate" see Preston on Estates, 146 as quoted in 4 Kent's Com. 7 Ed. 598.

The words "to have at her disposal," taken in the connection in which they stand, do not convey the fee. They were obviously designed as a part of the words of limitation to a mere limited estate. It cannot be supposed that the testator while limiting the enjoyment of the property devised, to the period of the devisee's widowhood, intended that in contemplation of another marriage, she might dispose absolutely of the devised property, and then have and enjoy the avails of the property, after another marriage, when that marriage would have terminated her right to the enjoyment of the original property itself.

Neither an enlarged and liberal interpretation, with regard to the probable intent of the testator, as gathered from the whole

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will, or a more strict and literal interpretation of the words "to have at her disposal," would give the widow more than the bare use and enjoyment of the property.

He has not given to her the right to sell and absolutely dispose of the property; but only the use of it, in the same way that the property of one person is placed at the disposal of another, when leased or loaned to him for a given time; and the word *disposal* was obviously used in the ordinary and often used sense.

The devise to the widow is all in one single and connected clause, and the limitation was obviously intended to the whole devise, as in *Finny v. Ewartson*, 4 Maule & Sel. 58.

The opinion of the court was delivered by

BENNETT, J. It is claimed by the appellants, that under the will of her husband, the widow took, but a life estate, in that portion of the real estate devised to her; and that the heirs upon her decease, were entitled to the reversion; while on the other hand it is claimed, she took a fee. The clause in the will, under which the question arises, is thus expressed; "I give to my beloved wife one third of all my personal and real estate, *and in addition to that*, I give her one cow, ten sheep, and one hundred dollars in money, to have at her disposal during her natural life, or so long as she shall remain my widow." It is not claimed by the plaintiffs, but what the widow would have taken an estate in fee, had it not been for the concluding part in this item in the will, and we apprehend, the counsel were right in yielding so much.

The word *estate*, used in a will in its application to real property, may be used to express either the quantity of interest devised, or to designate the thing devised, or both; and the sense in which it is used must be determined from the will itself. The rule laid down in the books, is, that though it refer to some particular lot of land, yet it will carry a fee, unless restrained by some other expression. 4 Kent's Com. 598, n. a. The question then is, is the operation of the word *estate* restrained by the closing paragraph in this item in the will. There may be some ambiguity, as to the meaning of the testator. We should carry out that intention, if it can be done consistently with the rules of law; and in this case, the great inquiry is, what was his intention?

The *grammatical* construction of this item in the will is, I think,

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somewhat obvious. The testator, first gives to his wife one third part of all his real and personal *estate*; and then proceeds, and "*in addition to that,*" he gives her one cow, &c., to have at her disposal during her natural life, or so long as she shall remain his widow. It is apparent, that it was the intention of the testator to give the wife a life estate in the articles specified in the way of addition to the first clause in the bequest, with a power of sale. But we think, the natural construction is to confine the qualification or limitation to what is given to the widow, *by way of addition*. The two parts of this item in the will of the testator, are distinct and independent, and each complete in itself. He first gives his wife one third part of all his personal and real estate; and then increases that amount by adding to it a life estate in what is subsequently particularly specified.

It has been said by Judges, that the word *item* is a usual word in a will to introduce new and distinct matter, and that consequently a clause thus introduced is not to be influenced by, nor to influence a precedent or subsequent sentence, unless it be in itself imperfect and insensible, without such reference. *Hopewell v. Arkland*, 1 Talkeld 239. Much more clearly do the words, "*and in addition to that,*" import the introduction of new and distinct matter from that, which had gone before, than what would have been done by the word *item*.

In the case of *Doe v. Wright*, 3 Term Rep. a devise was made to J. W. of all the lands of the testator in A.; and also to J. W. all the *estate* of the testator in B.; and it was held that only a life estate was given in the lands in A.; that is, that the word *estate* in the last clause, could not enlarge the operation of the word "lands" in the first clause, upon the ground that the two clauses were distinct and independent. The case cited in the argument from the 4 B. & C., is very like the case now at bar.

In the construction of a will, the grammatical one, if obvious should not be departed from, unless it would lead to absurdity, or unless there is enough in the will to satisfy the mind, that it was not the intention of the testator to have it construed according to its grammatical construction. In the present case there is nothing absurd or unreasonable in the idea, that the husband should wish to increase the widow's portion somewhat above one third of his estate, and there is nothing in any other portion of the will to

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control or qualify the clause in question. Indeed, I think, the other parts of the will countenance the construction we give to that part of it now in question.

It can hardly be supposed, that the testator intended, that a portion of his property should be disposed of as intestate property; and if we were to hold that the wife took but a life estate in the lands, I rather apprehend such would be the effect, as to the reversion of the widow's portion. Where he uses the expression, as to the remainder of my *property*, it may with propriety be considered as descriptive of, and designating the subject matter of the property given the children.

The words, "*and in addition to that,*" introduced new and distinct matter, and the qualification in the last member of the paragraph is not to influence what has gone before, which is perfect and sensible in itself.

The case of *Finny v. Ewartson*, 4 M. & S. 58, cannot control this case. In that, the court held that it was the intention of the testator to reserve to the close of the will the pointing out the kind of estate, he devised in each clause of the will, and this intention was inferred mainly from the numerical arrangement. Though the case from the 4 M. & S. has an analogy to the case under consideration, yet it is not so identically the same as some which have been referred to upon the other side.

This construction of the will renders it unnecessary to decide any other questions arising under the pleadings.

The decision of the court below is reversed, and the decree of the court of Probate is affirmed.

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J. C. & A. C. POWERS v. MARTIN LEACH, JR.

Depositions. Collateral testimony. Depositions when equivocal may be submitted to the jury, &c.

It is not competent for one to introduce testimony to contradict a witness, upon a matter wholly collateral to the main issue, and the court may in their discretion reject such collateral testimony altogether; so too the court may in their discretion allow a departure from the general rule, as is sometimes done in important criminal cases. 12 Vt. 586.

And where the witness was contradicted in a matter collateral to the main issue, and the court after admitting the evidence, submitted it to the jury whether upon the whole, they believed the main fact testified to by the witness, it was held that there was no error.

When a deposition is equivocal, the better rule is, to admit the testimony, and leave the interpretation to the jury with proper instructions from the court, though it is competent for the court to put its own construction upon the evidence.

And where the witnesses in their depositions when testifying of the reputation of other witnesses for truth and veracity, used the terms, "character for truth, &c.," and "general character for truth, &c.," it was held, that character, general character, report or reputation, when so used are the same, and that the depositions were properly admitted.

TRESPASS *quare clausum fregit*, for breaking and entering divers barns, and other buildings connected therewith, of the plaintiffs in Pittsford, and setting fire to and burning the same together with the contents.

Plea the general issue and trial by jury.

The plaintiffs with other evidence tending to prove the issue on their part, introduced the following deposition of one Charles A. Pine, of Constantine, in the county of St. Joseph, in the state of Michigan, who testified that "in the winter and spring after the "Powers commenced their prosecution against me and Mr. Leach, "in conversation, Leach said the Powers had commenced their "prosecution against us, and were abusing us, and that he did not "know any other way to stop their noise than by burning "their buildings; that if we burnt their buildings, they would "mistrust that it was him, (Leach) and let him alone. Leach "tried several times, to get me to burn the barns; I refused to do so; during this time I lived with Mr. Leach. In the "spring of 1847, I left Mr. Leach, and went to live on the farm

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"of Patience Bresee; Leach was frequently there, and I was frequently at his house, in the course of the summer; in the course of our conversation he said, he thought he could get Maygo, who then lived with him, to burn the barns. Leach had in the course of our conversation several times offered to give me fifty dollars, if I would burn the barns. Mr. Leach came to Mrs. Bresee's one Sunday, and told me he had got Maygo to burn the barns; that they would probably be burnt some time that week, that I had better stay evenings where I could show where I was; that as I had had difficulty with the Powers, it would very likely be laid to me. The next I heard of it was the next Sunday, when Mrs. Bresee came home from meeting, she told me the Powers' barns were burnt, that they were burnt the night before. On the same Sunday, I think, or the next Sunday, Leach came down to Mrs. Bresee's; I think I first alluded to the burning of the barns; Leach then denied having any knowledge about it. After that, we went into the lot together, and Leach then told me the circumstances of burning the barns; that Maygo burnt them; that the same afternoon, he (Leach) went to the village and came home at night unwell; when he got home he found Maygo unwell, that they staid about some time, and that Maygo went to bed in the presence of the family; after he had been abed awhile, he (Leach) steeped some herb drink, and carried it up to Maygo; I think he also told me he carried up a gun at the same time, and left it in his (Maygo's) room; that Maygo got out, I do not recollect that he told me the particulars how Maygo got out; that he (Leach) staid up about the house till Maygo returned, and he let him in, and soon after went to bed.

"*Cross Examination.*—I think Mr. Leach had several such conversations with me before I removed to Mrs. Bresee's; not a great many but several; and I think he made me the offer of fifty dollars before I removed. After I removed he continued these conversations till about two or three weeks before the time he told me he had got Maygo to burn the barns. I was sometimes at Leach's, as often as once or twice a week, and at other times not oftener than once in two or three weeks, after my removal to Mrs. Bresee's. I think Leach came to Mrs. Bresee's after she came from meeting, four

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"or five o'clock in the afternoon, I think the next day after the barns were burnt, though I cannot swear positively; I do not recollect of any business he had there, that day, nor what brought him down there. I think I first saw Leach as he drove under the horse-shed, where I first conversed with him about the fire, and I think we went into the meadow before Leach went into the house. The horse-shed may be four or five rods from the house. I do not recollect that any one was about there when Leach drove up. I first disclosed these conversations to my two brothers at Burlington, two years ago this fall, according to my recollection. Questions were frequently asked me before that time about the burning of the barns. I do not recollect particularly the answers I made. I might sometimes carry the idea one way, and sometimes another; I might have intimated my belief in relation to the matter; but do not know that I ever, before the time alluded to, intimated that I had any knowledge about the burning of the barns; I cannot recollect when Leach told me he thought he could get Maygo to burn the barns; it was sometime in the course of the summer; it might have been as late as three or four weeks before the barns were burnt. I do not recollect how Leach came to mention this to me. I do not think I ever encouraged Leach in this thing; but told him such things had better be let alone. I think I told him this in the outset. When he made me the offer of fifty dollars, I told him I should have nothing to do about it, and that I did not want to do anything about it. I came here two weeks ago to-morrow."

The counsel inquired of the witness what compensation the plaintiffs gave him for coming here—to which the plaintiffs objected—under objection the witness says; "the plaintiffs are to give me eighty dollars and pay my expenses, except the expense of my return, which I am to bear myself. None of the Powers ever attempted to hire me to testify against Mr. Leach, or to get me to testify that Leach got Maygo to burn the barns. I never said anything of that kind to William Beals. I have never had any difficulty with Mr. Leach, and I knew of no difficulty between us the last time I was at his house, a year ago the summer past, and I know of none since. I never used threats against Mr. Leach. When told by Mr. Leach that he had got

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"Maygo to burn the barns, I did not notify the Powers, because I did not wish it to be known that I had any knowledge about it, and because I did not wish to do anything about it. It is about 950 miles, from my place of residence to Rutland."

There was no evidence of the fact of the admissions made by the defendant to said Pine, except the said deposition.

The defendant introduced testimony tending to prove that the said Leach did not go to the Mrs. Bresee's named in the said deposition, and was not seen there by the said Pine upon any of the Sundays named by the deponent in his deposition. The defendant thereupon requested the court to instruct the jury, that if they should find from the evidence, that the defendant did not go to Mrs. Bresee's, and was not seen by said Pine there, upon either of the Sundays named in said deposition, they should lay aside, as not entitled to credit, the testimony of said Pine, as to the admissions of the defendant, made on those occasions respectively. The court declined so to charge the jury, but did charge that if they should find that the defendant did not go to Mrs. Bresee's on either of the Sundays named in the deposition, and was not seen there by Pine on either of said Sundays, that fact would tend to impeach and discredit Pine's testimony; but the extent of credit which should be given to Pine's testimony as to the admissions made to him by the defendant, was a matter for the jury, and they might find such admissions proved, although they should find the fact of the defendant's absence at the time set by Pine, as claimed by the defendant, if they believed Pine was mistaken only as to the time and place, or they might reject his testimony entirely, as unworthy of any credit whatever.

The plaintiffs also introduced as a witness one William Maygo, who testified to material matters for the plaintiffs, and among other things, that he burnt the plaintiffs' barns by the direction of the defendant.

The defendant introduced evidence tending to prove that the general reputation of said Maygo and Pine, respectively, for truth and veracity was bad.

The plaintiffs, in order to sustain the character of said Maygo and Pine, in these respects, offered the following depositions:

Andrew J. Palmer, of Constantine, county of St. Joseph, state of Michigan, deposed as follows: "that I hold the office of

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"Treasurer of the Township of Constantine aforesaid, and have known Charles A. Pine, since he came from Vermont, in the fall of 1849,—have resided within a half mile of him, and believe that his general character for truth and veracity is good."

George Palmer, of Constantine aforesaid, deposed as follows: "that I hold the office of Township Clerk, in said Township of Constantine, and have known Charles A. Pine, since he came from Vermont, in the fall of the year 1849,—have resided within a half mile of him, and believe that his general character for truth and veracity is good."

Lyman B. Reynolds, of Williston, Vermont, deposed as follows: "that I have lived in the same neighborhood with Charles A. Pine, late of said Williston, and until said Pine left Williston, some two or three years ago, we were somewhat intimate from our youth. I have never heard any report against the character of said Pine, but always during our acquaintance, said Pine has sustained a good moral character, and stands on a par with other men for truth and veracity."

David A. Murray, of Williston aforesaid, deposed as follows: "that I have been acquainted with Charles A. Pine, from his youth to within five or six years, and I consider him to be a young man of good standing, and on a par for truth and veracity."

John Conley, of Onondaga, New York, deposed as follows: "that I have known William Maygo for the last eighteen months, and that his character for truth and veracity, is as good as men's in general as far as I know."

George N. Wakefield, of Williston aforesaid, deposed as follows: "that I have lived in the same neighborhood with Charles A. Pine, late of said Williston, for many years previous to his leaving Williston a few years ago, and during all my acquaintance with him, I have never heard any evil report of him, but believe he has sustained a good moral character, and was on a par with other men for truth and veracity." (This deposition was not objected to, till after it was read to the jury.)

The foregoing depositions, with the exception of the last, were objected to as immaterial and impertinent in substance, but they were admitted by the court, and read to the jury, except the court excluded all that part of the deposition of the said Reynolds, af-

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ter the word "*youth*," except the words, "*said Pine stands on a par with other men, for truth and veracity.*"

The deposition of the said Wakefield, was, after it had been read to the jury, objected to by the defendant, for the same reasons that were urged against the other depositions; but the court decided that the objection came too late, and charged the jury among other things, that no evidence of the character of a witness was admissible, legal or proper for the jury to consider, to impeach or sustain a witness, except evidence of the character of a witness for truth, and that all evidence of the character of a witness in any other particular than for truth, should be by the jury laid out of the case—to which charge no exception was taken.

The jury returned a verdict for the plaintiffs.

To the refusal of the court to charge as requested, in relation to the contradiction of Pine, and to the admission of the said depositions, the defendant excepted.

W. H. Smith and D. Roberts for defendant.

I. The defendant claims that having *disproved* the *time, place and circumstances* laid by Pine, as connected with the admissions of the defendant, he *disproved* the *admissions themselves*.

Observe, that as to the first admission, Pine fixes the *time and place positively*, without any words implying doubt or uncertainty. He asks no charitable construction from court or jury, that he may be mistaken as to time or place. The *time was* the Sunday preceeding the fire; the *place was* Mrs. Bresee's.

As to the second admission, the only uncertainty expressed by Pine, is as to which of the two Sundays named, was the true date of the admission.

Having disproved the *time, place and circumstances* laid by Pine, the court erred in instructing the jury that they might believe the admissions made at *some other time and place*, for legal belief can only be based upon evidence, and here was no evidence of other time or place, or opportunity even, when these or like admissions were or could have been made. At best, the conclusion against us could be only a conjecture or guess of the jury. But this the court could not license them to do. *Hollister v. Johnson*, 4 Wend. 639. *Manwell v. Briggs*, 17 Vt. 176.

"It is error to submit to the jury as a possible reconciliation of

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contradictory evidence, a supposed fact, of which no evidence whatever has been offered." *Haines v. Stouffer*, 10 Barr 363. 9 U. S. Dig. 417 § 52.

Again, the first admission has a peculiar force, from the circumstance of time—that it was made *before the fire*; and so far, the time is material. The charge of the court leaves the jury to infer that it is just as well, though that admission was made after the fire.

II. As to the depositions—

The true question is as to *general reputation* for truth. *Character*—"The peculiar qualities impressed by nature or habit on a person, which distinguish him from others." Webster's Dictionary. *Reputation*—"character by repute." *Ib.* When, therefore A. J. Palmer says of Pine, "I believe his character for truth and veracity is good," he is merely expressing his *belief* as to the qualities of the man; and when Reynolds says of Pine, "he stands on a par with other men for truth and veracity," he makes no reference to the estimation, in which Pine is held by the public, or to his character by repute; he does not even use the word *character* or its equivalent; but merely affirms his own belief that Pine is as truthful as other men. *Again*, the words stricken out, qualify and limit to the period of their acquaintance in Williston, the words which remain, thus the sense of what remains is changed by what is taken away.

Murray says of Pine, "I consider him to be a young man of good standing, and on a par for truth and veracity."

But what did the public consider? Did *they* consider *him on a par*? and par with whom or what?

M. G. Everts and Edgerton & Allen for plaintiffs.

I. The defendant was not entitled to the charge asked for relative to the evidence of Pine.

The request is virtually that the court pass upon the credibility of the witness. This has always been held to be the exclusive province of the jury. The court can pass only upon the competency of the evidence. Pine may have been mistaken as to time and place, and yet his testimony relative to the defendant's admissions be true. 1 Starkie on Ev. 578, 583. *State v. Roe*, 10 Vt. 110. The court were not requested to charge the jury to reject

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the evidence of Pine, if they found that he had wilfully falsified.

II. The charge of the court, relative to the contradiction of Pine, was sufficiently favorable to the defendant to satisfy the rule of law as to him. The court left the whole question of the credibility, and weight of evidence to the jury. *Starkie on Ev. and State v. Roe*, before cited.

III. The objection to the depositions which were admitted by the court, was that they were "*immaterial &c.*" The depositions objected to, excluding that part of the deposition of Reynolds which was excluded by the court, are both *material* and *pertinent in substance*, and in the usual form of evidence to impeach or sustain the character of a witness for truth. *State v. Smith*, 7 Vt. 141. 2 Phil. on Ev. note 844, page 460.

IV. The deposition of Wakefield was not objected to till it had been read to the jury. The objection then came too late, and the only thing which could be done in regard to it was to give the proper instructions to the jury, which instructions were given.

The charge relative to this deposition is not excepted to, and the practice is fully sustained by the case of *Warden v. Estate of Warden*, 22 Vt. 568.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. The objection to the testimony of Pine was certainly allowed to its most liberal extent by the court below. The issue attempted to be raised in regard to his testimony was altogether collateral to the main issue in the case, and the court might have rejected the testimony altogether, and it would not have been error. We may suppose, that such collateral issues might spring up, in regard to the testimony of every witness upon the stand, and thus a single issue branch out into an indefinite number of subordinate and collateral ones, and these again into as many more, upon each point, so that it would become literally impossible ever to finish the trial of a single case. This rule therefore, that one cannot be allowed to contradict a witness, upon a matter wholly collateral to the main issue, becomes of infinite importance, in the trial of cases before the jury. A judge may no doubt, in his discretion, allow a departure from the rule, but is not obliged to do so. This is sometimes done, in important criminal cases, depending upon circumstantial evidence and was very likely

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suffered in the present case, on account of the peculiar character of the evidence in the case upon one or both sides. But the judge after admitting the evidence, certainly gave the defendant every reasonable advantage, which he could rightfully claim, by submitting it to the jury, whether upon the whole, they believed the main fact testified to by the witness. This point is expressly decided by this court in *Stevens v. Beach*, 12 Vt. 585.

II. The objection to the other depositions (except that of Wakefield, which came too late,) are certainly ingenious, but it seems to us, too refined, for practical application to the detail of jury trials. Depositions are often equivocal, as some of these are and which, if the doubt is solved one way, should be rejected. The better rule in such cases, and the most acceptable one, to all, in the long run is, to admit the testimony, and leave the interpretation to the jury, with proper instructions, as was done in the present case. It is perfectly proper to submit the interpretation of a doubtful expression in a deposition, to a jury, since it is but oral evidence which it is their province to weigh and to interpret. But a court may also put its own construction upon the evidence, and direct a verdict, as has been often held, but it is not obliged to do so, as it is in regard to written contracts.

But it seems to us, that these depositions are well enough. In those of both Palmers, and Conley, the testimony is, as to the character of the witness for truth. In George Palmer's, the expression is general character—character and general character are the same of course, if by character, we understand the common estimation, in which the man is held, by his acquaintance, for truth. And the books upon evidence so use the term. The word character no doubt has an objective and subjective import, which are quite distinct. As to the object, character is its quality. As to man, it is the quality of his mind, and his affections, his capacity and temperament. But as a subjective term, certainly in the minds of others, ones character is the aggregate, or the abstract, of other men's opinions of one. And in this sense, when a witness speaks of the character of another witness for truth, he draws not upon his memory alone, but his judgment also. It is the conclusion of the mind of the witness, in summing up the amount of all the reports he has heard of the man, and declaring his character for truth, as held in the minds of his neighbors and acquaint-

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tances, and in this sense character, general character, and general report or reputation are the same, as held in the books.

Murray and Reynolds say, he is a young man "of good standing," and "on a par with other men for truth and veracity." This may mean merely the opinion of the witness, as to the man's truth, gathered from personal knowledge and acquaintance, and if so, ought undoubtedly to be rejected. But, as we said, it is equivocal, and taken altogether, seems fairly to import the opinion of the witness testifying as to the standing of the other witness, in regard to truth. It can fairly signify nothing else, I think. And a man's standing for truth is his reputation, his character among his acquaintance and neighbors for truth, and in this sense the testimony was admissible, and the jury were told not to regard it unless they considered it bore this signification and import, in the depositions.

Judgment affirmed.

ELIJAH SMITH v. ASA PERRY, ADMR. OF ESTATE OF I. REED.

Action for breach of covenant—who may sue—Evidence—Construction of deeds—of the Constitution of 1777, and act of 1779, requiring the record of conveyances—Grantor & Grantee.

The Constitution of this state adopted in 1777, required, in general terms, that all conveyances of land should be recorded in the town clerk's office; and in 1779 the Legislature passed an act in accordance with such provision, requiring such conveyances to be acknowledged and recorded in such office; *it was held*, that these provisions had exclusive reference to such conveyances of land only, as operated *inter vivos*, and not to mere devises of land.

And so in an action for covenant broken, *it was held*, that a will, that came in force at that time, was admissible in evidence, as tending to prove that the recovery of the land, in question, was by elder and better title than that of the covenantor, though the will had not been recorded in the town clerk's office.

And the plaintiff also offered the deed of B. and wife, of the premises in question, to Reed, the defendant's intestate, the wife of B. being the daughter of the testator, and it appeared that the said deed was not sufficiently acknowledged by the *feme*; on objection, the deed was *held* admissible in evidence, to show claim of title by Reed, the intestate, and to show claim of title under the wife of B.

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And as Reed, the intestate, held the land under B., his possession would not become adverse to the heirs of the wife of B., until their right of entry accrued, which could not be during coverture, or the estate by courtesy.

And where in a deed the first covenant was to M., the grantee, alone, and the habendum was expressed, in terms to the grantee, his heirs and assigns, and the covenant of warranty was general, "to warrant and defend the premises" not in terms to M. alone, while M. held them, but into whosoever hands they should come, it was held that this was not controlled by the preface that "I covenant with said M.," and that these covenants were operative after the grantee conveyed, and should be construed, as virtually in favor of any one seized of the estate.

[At common law, a covenant running with the land in the name of the grantee only, may be sued, by any one in the estate, at the time of breach.

As a general rule, the right of the grantee, or any intermediate assignee, to sue upon the covenants, after parting with the estate, is absolutely dependent upon his having made satisfaction to the person evicted. But if the suit is brought for the benefit of the person evicted, and especially when the estate of the original warrantor, is in a course of settlement in insolvency, there seems no hazard of injustice, in giving judgment for the full amount of the value of the land, against the estate once, on condition that if any other allowance shall be obtained, the judgment shall be reduced to a nominal sum. And in the present case, the court so rendered judgment, the action having been brought by the grantor of the person evicted, but he had recovered judgment against the present plaintiff on the breach, and made no objection to the present suit, nor had he presented any claim against the estate of Reed.

APPEAL from the probate court, for the district of Rutland; from the disallowance of the claim of the plaintiff, by the commissioners upon the estate of Issachar Reed, late of Rutland, deceased.

The plaintiff filed in the county court, the following amended declaration:

"In a plea of the case for covenant broken, for that on the 12th day of January, 1803, the said Issachar Reed, by his certain deed of that date, duly executed, signed with his hand and sealed with his seal and acknowledged and recorded, all in due form of law, for the consideration of eleven hundred dollars, paid to him, the said Issachar Reed, by one Zerah Mead, then of said Rutland, but since deceased, did give, grant, bargain, sell, alien, re-lease, convey and confirm unto the said Zerah Mead, his heirs and assigns, the following described piece of land and premises situate in said Rutland, and at the date aforesaid, bounded as follows:" [Here follows the description of the said land.]

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"To have and to hold the said granted and bargained premises
 "and the appurtenances thereof, unto him, the said Zerah Mead,
 "his heirs and assigns forever, to and for their own proper use,
 "benefit and behoof. And the said Issachar, among other things,
 "in and by his said deed, covenanted and engaged by his said deed,
 "with the said Zerah Mead, and to his heirs and assigns forever to
 "warrant and defend the premises granted and bargained, describ-
 "ed in his said deed as above set forth, to the said Zerah Mead, his
 "heirs and assigns forever against all claims and demands whatso-
 "ever, as by the said deed by the said Issachar, ready here in court
 "to be shown more fully and at large appears. And the said Zerah
 "Mead, thereupon on the same day, entered into the possession of
 "said premises. And the said Elijah avers that the same land and
 "premises, by good and proper warranty deeds, with the usual cov-
 "enants in such deeds, and for valuable considerations from grant-
 "ees to grantors, and well and lawfully executed and acknowledged,
 "has been deeded to him, the said Elijah, and by him to one Dennis
 "Smith of said Rutland, and the possession of said land and premises
 "has followed said deeds. And the said Elijah also avers that at
 "the date of the said Issachar's said deed, and ever thereafter,
 "the fee and title of inheritance in said land and premises, was in
 "the heirs of Christopher Bates and wife; to wit, in Silas Gid-
 "dings and Rachel Giddings, his wife, Lois Bates, Harris Bates,
 "Amy Bates, Hepay Bates, Roswell Bates and David Bates, be-
 "ing said heirs, and who had the fee in said land and premises at
 "the date of said deed. That the said heirs afterwards brought
 "their proper action of ejectment against said Dennis Smith and
 "Jonathan Russell, his tenant, in possession of said premises, for
 "the seizin and possession of said land and premises, and their
 "damages and costs, returnable to the county court in and for the
 "county of Rutland, at the September Term of said Court, 1839,
 "and such proceeding were had in said cause, that at the Sept.
 "Term, 1840, of said county court, the said heirs, Silas Giddings
 "and others recovered a judgment for the possession of said prem-
 "ises and land, and for 75 dollars damages and their costs in that
 "behalf, against the said Dennis and said Russell—to which judg-
 "ment exceptions were duly taken, and the said cause passed to
 "the Supreme Court, and such proceedings were further had in
 "said cause in the Supreme Court aforesaid, that at the term of

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“ said Supreme Court held at Rutland, in and for said Rutland
“ county, on the 5th Tuesday of January, 1848, the said heirs,
“ Silas Giddings and others, plaintiffs as aforesaid, recovered final
“ judgment in said cause for their title and possession of said de-
“ scribed land and premises, and for the sum of 87 dollars dam-
“ ages, and the sum of 50 dollars and 5 cents costs of said suit, and
“ by force of a proper writ of execution in said cause, entered up-
“ on and took possession in due form of law, of said lands and
“ premises, and turned the said Dennis Smith out of the same, and
“ said heirs now legally hold the same land in fee ; and said heirs,
“ plaintiffs as aforesaid, duly collected of said Dennis, the said
“ damages and costs, recovered as aforesaid ; to wit, on the 5th day
“ of June, 1847. Whereupon the plaintiff avers that the said
“ Dennis Smith brought his action against the plaintiff upon the
“ covenants of warranty in the plaintiff's said deed to Dennis
“ Smith of the said lands and premises, returnable to the county
“ court, within and for said Rutland county, at the September term,
“ 1847, of said court, and such proceeding were had in said last
“ mentioned cause, that at the April term of said court, 1850, the
“ said Dennis recovered judgment therein against the said plaintiff,
“ for the sum of 2,063 dollars and 81 cents damages, and 51 dol-
“ lars and 16 cents costs of said suit, as by the record thereof re-
“ maining in said court appears. And thereupon the plaintiff avers
“ he was compelled to pay and satisfy, and did pay and satisfy to
“ said Dennis the amount of said judgment for damages and costs ;
“ to wit, on the first of July, 1850. And the said Elijah further
“ says that the title upon which the said Silas Giddings and others,
“ heirs as aforesaid, recovered the said judgment against said Den-
“ nis, was older, better and independent of the title derived from
“ the said Issachar Reed, that the said Issachar Reed deceased at
“ said Rutland ; to wit, on the day of , 188 , and
“ that Asa Perry, was on the 15th day of May, 1841, duly ap-
“ pointed administrator upon the estate of said Issachar Reed, and
“ the eviction of the said Dennis from said premises as aforesaid,
“ under the title of the said heirs of Christopher Bates and wife,
“ was while the said Asa was proceeding in the settlement of said
“ estate, and before the estate of said Issachar Reed was divided
“ and set out to the heirs of said estate, and while the property
“ pertaining to the estate of said Reed remained in the hands of

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"said Asa as administrator as aforesaid. And in fact the plaintiff says that the said Asa has not yet settled said estate, and still retains the possession of the property of said estate, in his hands, as assets for the payment of the just claims against said estate. And the plaintiff says that by the proper warranty deeds of said premises by said Zerah Mead to this plaintiff, well executed and for a valuable consideration, the said covenants of the said Issachar have come and inured to this plaintiff, who is entitled to the benefit of the said covenants; that according to the said covenants the said Dennis should have enjoyed said premises in lawful estate in fee simple, and this plaintiff saved from the said judgment of said Dennis against him by which he is damnified. And so the said plaintiff says the said Issachar, during his life time, and his said administrator since his decease, did not and has not kept said covenants, but broken the same," &c.

The defendant craved oyer of the said deed of the said Issachar Reed, in the plaintiff's declaration mentioned, which is read to him in these words:

"Know all men by these presents, that I, Issachar Reed, of Rutland, in the county of Rutland, and State of Vermont, for and in consideration of eleven hundred dollars, received to my full satisfaction of Zerah Mead, of Rutland, in the county of Rutland, and State of Vermont, do by these presents give, grant, bargain, sell, alien, release, convey and confirm unto the said Zerah Mead, heirs and assigns, a certain piece, or tract, or parcel of land, situate, lying and being in Rutland, aforesaid, and is bounded:" [Here follows the description of the land.]

"To have and to hold the above granted and bargained premises, with the appurtenances, thereof, unto him, the said Zerah Mead, his heirs and assigns forever, to and for their own proper use, benefit and behoof.

"And also, I, the said Issachar Reed, do for my heirs, executors and administrators, covenant with the said Zerah Mead, that at and until the enrolling of these presents, I am well seized of the premises as a good indefeasible estate, in fee simple, and that the same is free from all incumbrances whatsoever, and that I have a good right to bargain and sell the same in manner and form as above. And I do hereby engage for myself and heirs

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"to warrant and defend the above granted and bargained premises
"against all claims and demands whatsoever.

"In testimony whereof, I have hereunto set my hand and seal
"this 12th day of January, A. D. 1803.

ISSACHAR REED." (Seal)

Which being read, the defendant pleaded, 1. That the said supposed deeds or writings obligatory in the said declaration of the appellant mentioned, are not the deeds of the said Issachar, and of this put himself on the country.

2. And for a further plea, the defendant pleaded that the said appellant ought not to have and maintain &c., because he says the said Issachar did not in and by said deeds, in said declaration mentioned, covenant as mentioned in said declaration, to and with the assigns of the said Zerah Mead, but only with the said Zerah Mead, as by the said deeds of the said Issachar appears, and of this the defendant put himself on the country.

3. And for a further plea, the defendant pleaded, that said Issachar Reed and his heirs have warranted and defended the premises granted and bargained in and by his said deed, against all claims and demands whatsoever, according to the form and effect of said deed, of said Issachar, and of the said covenant of the said Issachar by him in that behalf, made as aforesaid, &c., and of this defendant put himself on the country.

4. And for a further plea, the defendant pleaded, that said Issachar did during his life time, at all times warrant and defend the premises granted and bargained in and by his said deed, against all claims whatsoever, according to the form and effect of the said deed of the said Issachar, and of his covenant therein, &c., and of this defendant put himself on the country.

5. And for further plea, the defendant pleaded, that neither the said Silas Giddings, Rachel Giddings, his wife, Lois Bates, Harris Bates, Amy Bates, Hepsy Bates, Roswell Bates, and David Bates, nor any other persons other than the said Dennis Smith, were at the time mentioned in said declaration, the rightful owners of the premises, described in the deed of the said Issachar, to the said Zerah Mead; nor had they at that or any other time after the conveyance of the said Elijah to said Dennis, an independent, elder or better title to said premises, than that of the said Dennis derived from or under that conveyed by the said Issachar to the

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said Zerah Mead, and of this defendant put himself on the country.

The defendant also in addition to the above pleas, filed, in substance, the following plea, "that the said appellant ought not to have and maintain &c., because said appellant has not paid and satisfied to the said Dennis Smith the amount of said judgment for damages and costs, recovered by said Dennis against him, or any part thereof &c., and this said defendant prays may be inquired of," &c.

Replication.—1. The plaintiff as to the *first* and *fifth* pleas of the defendant, whereof defendant put himself on the country, doth the like.

2. And as to the *second* plea of the defendant, the plaintiff demurred; and for causes of demurrers set forth the following: "For that defendant has not traversed or attempted to put any material matter of fact alleged by the plaintiff in his said declaration, but has attempted to put a matter of law in issue, to be tried by a jury," &c.

3. And the plaintiff, as to the *third* and *fourth* pleas of the defendant, for replication to the same, saith that he ought not to be barred &c., because he says that after the decease of the said Reed, and after the granting of letters of administration to the said Asa upon the estate of the said Reed, and while the said administrator was proceeding in the settlement of said estate, and before the same had been divided among the heirs to said estate, in the court of probate, and while the property which pertained to the said Reed in his life time, remained in the hands and possession of the said Asa, as such administrator, as assets for the payment of the just debts of the said Reed, the said Dennis Smith was evicted and expelled from the possession of said premises by a title paramount to the title of the said Reed; as alleged in the plaintiff's declaration. And so the plaintiff says that said Asa, as such administrator as aforesaid, has not kept and performed the said covenants of the said Reed, but has broken the same, and this the said Elijah is ready to verify. Wherefore inasmuch as the said defendant has not answered the said breaches of covenant, for which the said plaintiff seeks to recover, the plaintiff prays judgment and his damages, &c.

Rejoinder.—1. The defendant, to the replication of the plaintiff,

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to his third plea says, (in substance) that the plaintiff ought not by reason &c., because he says that the said Dennis Smith was not evicted and expelled from possession of said premises by a title paramount to the title of the said Reed, after the decease of said Reed, and after the granting of letters of administration to the said Asa, upon the estate of said Reed, and while the said administrator was proceeding in the settlement of the said estate, and before the same had been divided among the heirs to said estate, in the court of probate, and while the property that appertained to the said Reed in his life time, remained in the hands and possession of the said Asa, as such administrator as aforesaid, as assets for the payment of the just debts of the said Reed, as the said Elijah in his replication has alleged, and of this defendant put himself on the country.

2. And defendant demurred to the replication of the plaintiff to his *fourth* plea.

Sur-Rejoinder.—1. The plaintiff, as to the rejoinder of defendant first pleaded, whereof defendant put himself on the country, doth the like.

2. And as to the rejoinder of defendant secondly rejoined, plaintiff says his replication to the *fourth* plea of defendant, is sufficient in law, and that said rejoinder is insufficient, &c.

The County Court, April Term, 1853,—PЕСС, J., presiding,—on the hearing upon the demurrer to defendant's second plea, and to the replication to the fourth, adjudged the second plea insufficient, and the replication to the fourth plea sufficient, and overruled defendant's demurrer. To which descisions the defendant excepted.

At the same Term of the county court, there was a trial by the court of the issues of fact raised by the pleadings, which with the declaration are made part of the case.

On trial, in order to prove that the recovery by Giddings and others, stated in the declaration was by an elder and better title than that of Reed; the plaintiff showed the title in the premises to have been formerly in one Daniel Harris, and for the purpose of tracing the title of Giddings and others from said Daniel Harris, the plaintiff offered in evidence the original will of the said Harris, which was objected to by the defendant, on account of its never having been recorded in the town clerk's office of Rutland, and the defendant offered to prove that it had never been so recorded.

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No title, except from Harris, was attempted to be shown in Giddings and wife. The court decided that a record of it in the town clerk's office was unnecessary, and treating it as proved that it had not been so recorded, admitted it to be read in evidence, in connection with the deeds and evidence hereafter mentioned :—to which decision the defendant excepted. The will was dated June 9th, 1774, and was probated the 2d day of May, 1781.

No legal testimony was offered to show, nor was it proved that the plaintiff had ever paid, or in any way satisfied the judgment recovered in favor of Dennis Smith against him; and the court decided that a payment or satisfaction of that judgment was unnecessary to entitle the plaintiff to recover, and rendered judgment (the other points in issue being satisfactorily proved) for the plaintiff to recover. To this decision the defendant also excepted.

The plaintiff introduced a deed of the premises from James Mead to Daniel Harris, dated December 25th, 1773, a deed of the premises from Christopher Bates and his wife, Elizabeth, (who was proved to be the same Elizabeth Harris who was devisee in said will,) dated in 1797, to Issachar Reed, a deed of the premises from Issachar Reed to Zerah Mead, dated January 12th, 1803; a deed of the premises from Zerah Mead to Elijah Smith, dated April 21st, 1806; a deed of the premises from Elijah Smith to Dennis Smith, dated December 28th, 1825.

The defendant objected to the introduction of the deed from Christopher Bates and wife, on the ground that at the date of that deed a justice of the peace had no power to take the acknowledgment of a deed by a married woman; but the court decided that it was admissible, for the purpose of showing that defendant and plaintiff, and Giddings and wife, and Dennis Smith claimed under said will through Elizabeth Harris, and for which purpose it was offered by plaintiff in connection with said will.

It appeared, that said Elizabeth died February 24th, 1838, and that Christopher Bates died May 8th, 1836. The recoveries alleged in favor of Giddings and wife against Dennis Smith, and in favor of Dennis Smith against Elijah Smith, were proved.

It appeared, that said Giddings' wife was the daughter and heir of said Elizabeth, by her marriage with said Bates.

It also appeared, that there had been an adverse uninterrupted possession of the premises by Zerah Mead, Elijah Smith, and

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Dennis Smith, under their deeds respectively, which taken together was more than fifteen years next before the commencement of the suit of Giddings and wife, against Dennis Smith, but that the said Elizabeth was a *feme covert* at the time said possession commenced, and continued so down to within fifteen years next before the commencement of that suit, and until her death in 1833.

The court found that Dennis Smith knew that the plaintiff was prosecuting this suit, and it did not appear that he had made any objections to his prosecuting the same, or that he had made any claim on said Reed, or on his estate, on said Reed's covenants in his deed.

Exceptions by defendant.

C. L. Williams for defendant.

I. The covenant of Issachar Reed in his deed to Zerah Mead, as set forth in defendant's first plea, was made to and with Zerah Mead alone, and not with his assigns. This appearing on oyer of the deed, shows the declaration bad; and on this account the demurrer to our second plea should have been decided in our favor.

The covenants in the deed are in terms with Mead alone, and from the language used cannot be extended to his assigns.

When a party declares how far he will be bound to warrant, that is the extent of his covenant. 3 U. S. Digest 121.

The intention of the parties must govern when there is no ambiguity. Where a clause in a deed containing covenants of seizin in blank, as to the names of the parties who are seized it does not amount to a covenant of seizin in the grantors. 1 U. S. Digest 674.

In the present case, the grantor omitted to mention or name the assigns of Mead in the covenanting clauses; and this omission, we insist, *was intentional*, for he expressly mentions them in the statement of the persons to whom he conveys, and in the *habendum* clause. The prefatory statement of the person with whom he covenanted, without any mention of what his covenants were, must be taken as his avowed declaration of the person, and of *the only person*, with whom were made all the covenants thereafter mentioned.

II. The plaintiff has suffered no damage; he was not evicted from the premises while he possessed them, nor has he been com-

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pelled to pay, and actually paid his grantee since. Dennis Smith could sustain this action as well as the plaintiff, his mere recovery of a judgment against the plaintiff without a satisfaction of it, would not bar him, nor will a recovery by the plaintiff with a misappropriation of the funds be any defence to the defendant against Dennis Smith.

While, therefore, Dennis Smith is the only one, as yet *actually damaged*, our liability is only to him; and the issue upon our *sixth* plea should have been decided in our favor. 4 Kent 472, *note*, and cases cited.

III. The will of Daniel Harris was not admissible as evidence for the plaintiff, upon the trial of the issue upon our *fifth* plea. At the time it was probated, (1781,) the constitution required, as it ever since has, that "All deeds and conveyances of lands shall be recorded in the town clerk's office in their respective towns." (Slade's State Papers 253, 258.) And an act of the Legislature passed in 1779, (State Papers 327,) required the town clerk to record in a suitable book "every man's house and land granted and measured out to him." Was this will a conveyance? The title to the premises was never transmitted or conveyed from Daniel Harris, except by this will; and it must have been the intention of the framers of the constitution, in using the word "*conveyances*," to include all instruments in writing, other than deeds, by which titles were *conveyed* from one person to another, in order that everything, pertaining to the ownership of land, might appear upon the town records.

The deed from Christopher Bates and wife to Issachar Reed, was inadmissible, it never having been acknowledged by her, and was, therefore, as to her, *ipso facto* void, (15 Vt. 356,) it conveyed no title from her to the grantors of Dennis Smith, and should not have been admitted to show in us an invalid claim, upon which we did not rely, and which we could not set up ourselves. The deed being, as to Elizabeth Harris, void, it did not and could not show that we claimed through her, and was therefore inadmissible for that purpose. The possession of Dennis Smith and his grantors, under the deed of Issachar Reed, or that of Zerah Mead, given as early as 1806, was a sufficient title for him, unless Giddings and his associates had a valid title from Daniel Harris, which

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could only be shown by introducing his will; if the will was inadmissible, no such title could be shown.

W. H. Smith for plaintiff.

I. The defendant's second plea tenders the issue to the country upon *matters of law*; and is clearly open to demurrer. *Hodges v. Strong*, 10 Vt. 247.

II. The original will of Daniel Harris was properly admitted in evidence without having been recorded in the town clerk's office. Its *age* proved it; and both parties claiming under it gave either the right to use it as evidence. *Giddings v. Smith*, 15 Vt. 348-9.

Neither the constitution of July 2, 1777, or the statute of 1779, contemplated the recording of wills, but only deeds &c. Vt. State Papers 253, 327, 336.

Such papers as were contemplated, were to have been "*acknowledged*," as well as recorded, which shows that wills could not have been intended.

Besides, the *exceptions* in the act will admit this will between these parties, as conveyances *without record*, by the act, were to be good *as between the parties*, and equally so between *privies*, claiming under the same title. Vt. State Papers 336.

The deed from Bates and wife to Issachar Reed, was admissible for the purpose for which it was offered and admitted; even though it might not have been, to have shown *title* in Reed; it was for the purpose of showing, or tending to show *claim of title* by Reed from that source. A defective deed is often admitted to show the parties' *claim of title*; and might have been used without any acknowledgment. *Pitkin v. Leavitt*. 13 Vt. 383.

III. The defendant can take no benefit, nor can the plaintiff be prejudiced, by the possession had and held under Bates' and his wife's deed, and then of defendant's assignees; since that possession was legal and proper under Bates' deed till his death, in May, 1836; and the heirs brought their action of ejectment in 1839.

The title of the heirs was wholly independent of Elizabeth Bates, and no possession under her could make a title against them. But all foundation for a possessory title fails, since she was under the excepted disability of *coverture* at the time.

IV. It was wholly unnecessary to have alleged payment of

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the judgment of Dennis Smith, against this plaintiff, or having alleged to prove it. 1 Aik. 239.

The case finds that the ultimate grantee of this covenant has pursued this plaintiff, his grantor, to final judgment: and now stands by and sees this plaintiff prosecuting this claim against the defendant without remonstrance, and without himself presenting any claim against this estate. This issue was immaterial, and should be disregarded, and judgment rendered according to the rights of the parties upon the merits of the whole case. 11 Vt. 195.

V. The "elder and independent title" of the heirs alleged in the declaration is fully proved.

The case finds the title to have been in Daniel Harris. *Giddings v. Smith*, 15 Vt. 344.

VI. The *covenant of warranty*, in the deed of Issachar Reed, is *general* and *unlimited* in its terms, *running with the land*, and enures to the security and benefit of any subsequent grantee of the land.

The *conveyance* in the deed and the *habendum* is to the grantee and his heirs and assigns forever, and his covenants of *warranty* follows the conveyance of the land.

That the *personal* covenants of *title, seizin, &c.*, are by the *deed*, as they are *by law, limited*, and not to the assignees, in no manner affects the covenant of *warranty* with which the former are not connected in the deed or likened in the law. *Williams v. Wetherby*, 1 Aik. 239.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. In showing that the recovery of the land was by elder and better title than that of the covenantor, the will of Daniel Harris was put in the case, by the plaintiff. It is objected to this, that it did not appear to have been recorded in the town clerk's office. This will was dated June 9, 1774, and proved May 2, 1781. It is not claimed that the existing statute requiring proceedings in the probate court, affecting the title of real estate, to be recorded in the town clerk's office, can affect the present case, this statute being only of a comparatively recent date. But reliance is made upon the constitution of the state, at the time this will came in force, which required, in general terms,

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all conveyances of land to be recorded in the town clerk's office, and the statute passed in accordance with such provision, which required such conveyances to be acknowledged and recorded in such office. We think those provisions undoubtedly had exclusive reference to such conveyances of land only, as operated *inter vivos*, and not to mere devises of land. It was certainly not the practice to record wills, to any great extent in the town clerk's offices, in many sections of the state, until a comparatively late period, which gave rise probably to the present statute upon that subject.

II. The deed of Christopher Bates and wife, the wife being a daughter of said Harris was also put in evidence, by the plaintiff for the same purpose. This deed is objected to, as not sufficiently acknowledged by the *feme*, that being done before a justice. But we think the deed was sufficiently proved to make it evidence, by way of estoppel, upon the grantee. It was only offered to show claim of title by Reed, and was the deed of Bates, and good to show claim of title under the wife, and thus to introduce the very defect of title, upon which the land was lost to the covenantee, or his assignee; i. e., that no fee simple existed by the will, in Bates' wife, and that neither she or her husband could convey any such estate. As in fact Bates survived his wife, the deed conveyed all that it would have conveyed, if it had been properly executed by the wife, unless it would then have barred the entail, which is not very probable. It will show then, that Reed held the land under Bates, and that his possession would not become adverse to the heirs of the wife, until after their right of entry accrued, which could not be during the coverture, or the estate by courtesy. We think this deed was evidence for this purpose, and that the proof did show that the recovery was by elder and better title, and so met the issue.

III. The deed of Reed to Zerah Mead, is certainly not in the most usual form. But it seems to have been drawn according to the legal effects of the covenants. Those of seizin, and good right to convey, and against incumbrances which are merely personal, and not assignable, are in terms confined to the grantee, which is giving them all the force, which, in law, could be given to them. As they do not run with the land, and cannot be sued by an assignee of the estate, the introduction of the word assigns

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would have been merely nugatory. So also of executors and administrators, as they succeed the legal rights of the covenantee, by act of law, as well without being named, as if they were so named.

But the deed shows, that no purpose existed of limiting or attempting to limit the assignable quality of the estate conveyed, as the habendum of the deed is expressed in terms to the grantee, his heirs and assigns. And if it was the purpose to convey an assignable estate, and covenants were given to fortify the title, and for quiet enjoyment, and which do run with the land, it must have been intended, that these covenants should be operative after the grantee should convey, and in favor of all, who, in privity of estate, should be entitled to take the benefit of them. And this no doubt would be the legal effect of such a covenant in general terms to the grantees. It should be construed as virtually in favor of any one seized of the estate, as he would be the only one damaged by the breach unless in express terms of negation, confined to the grantee, as the three first covenants in this deed seem to be.

But the covenant of warranty is general, "to warrant and defend the premises," not in terms to Mead alone, while Mead held them, but into whosoever hands they should come. We must think this was the purpose of having the covenant expressed, in these general terms, and that it is not controlled by the general preface, that "I covenant with said Zerah Mead," which really does not seem to have any very apparent force in the deed. But it seems perfectly well settled, that at common law, a covenant running with the land, in the name of the *grantees only*, may be sued by any one in the estate, at the time of breach. 1 Smith's Leading Cases 110, citing a great many cases, and *Kingdon v. Notile*.

IV. In regard to the right of the present plaintiff to sue without first making satisfaction to the person evicted, there is perhaps some difficulty.

In Connecticut, in *Booth v. Starr*, 1 Conn. 244, and in N. H. in *Chase v. Weston*, 12 N. H. 413, it is considered, that the right of the grantee, or any intermediate assignee, to sue upon the covenants, after parting with the estate, is absolutely dependent upon his having made satisfaction to the person evicted. And upon principle it would seem such should be the rule, in order to pre-

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vent a liability to repeated judgment, for the same thing. This be sure is not an unanswerable impediment. There are cases where a party is so situated as to be subject to such embarrassment. But ordinarily such a result is to be deprecated, as it might render a resort to chancery necessary.

The first covenantor seems to be the one primarily liable. The other covenantors come in aid of his undertaking, and are virtual sureties, with a right of indemnity over against the first warrantor. But as the undertaking is to save them absolutely harmless, even from liability, they may perhaps all sue at once for indemnification, upon the occurrence of an eviction. But upon common principles can they recover the full value of the breach, until they have paid the amount to the person evicted? If so, the original covenantor may be liable to an indefinite number of suits and judgments, for the full value of the land, and the payment of one, will possibly not satisfy the other judgments at law. It clearly will in equity, if made, as it should be, to the person evicted.

But if the suit is brought with the privity, and for the benefit of the person evicted, and especially when the estate of the original warrantor, is in a course of settlement, in insolvency, there seems no hazard of injustice, in giving judgment for the full amount of the value of the land, against the estate once, on condition that if any allowance shall be obtained, this judgment shall be reduced to a nominal sum. This will remove all question, and the judgment will be affirmed, under this rule, and so certified to the probate court.

It has been decided in this state, that the person evicted has the primary right of action, and that after the intermediate grantee has made satisfaction to the person evicted, he alone can sue. *Williams v. Wetherbee*, 1 Aikens 238. And that an intermediate grantee who has conveyed the estate, without warranty, cannot sue for a breach of the covenant, after he parted with the estate. *Keith v. Day* 15 Vt. 660. And possibly the recovery of judgment, against the intermediate warrantor, for the full value of the premises, may alter the state of such warrantor, as to his right of full damages. I do not now see how it should, upon general principles. In Smith's Leading Cases 110, in notes to Spencer's case it is said by Mr. Smith, that the better opinion of the English law is, that the covenantee, after assignment, cannot sue for a

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breach in the time of the assignee. *Green v. Jones* 6 M. & W. 656.

The judgment is affirmed under a rule, that if any other sum should be allowed against the estate of Reed, for the breach of this same covenant, it shall be deducted from the damages recovered in this action. And is thus to be certified to the probate court.

ORSON G. HULETT v. EDWARD S. SOULLARD.

Principal and Surety—Levy on real estate—Surety's rights, when he pays the debt of the principal.

Where a levy was made upon the equity of redemption, and the mortgage described two certain parcels of land, and also a third parcel which was a lease-hold estate, the lease being a perpetual lease, reserving an annual rent, and the levy was made upon the equity of redemption in the two first mentioned parcels of land, without regard to the lease-hold estate, thus treating the mortgage as containing only the the two first mentioned parcels of land, it was held, that the levy was properly made.

And it was also held, that as the lease-hold estate was described in the mortgage by metes and bounds, that it would be only an assignment of the rents, and that as a mortgage in this state does not confer a power of sale, the mortgage could only receive the annual rent, and might enforce his debt upon the other pieces of land.

If the surety in any way extinguishes or pays the debt of the principal, it is, so far as the principal is concerned, equivalent to paying money for his benefit and at his request, and the surety can maintain general assumpsit for money paid, against the principal.

And if the surety is sued upon the debt of the principal, and it goes into a judgment and is levied upon the lands of the surety, the surety may recover of the principal both the debt and costs, as money paid.

ASSUMPSIT for money lent and paid out for the defendant's use. Plea, the general issue, and trial by the court.

On the trial of the cause it appeared in evidence, that the defendant as principal, and one Rich Weeks, Joel Stevens and the plaintiff as sureties, executed a joint and several promissory note, to

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one Hervey Paris, for the sum of five hundred dollars; and that a suit was commenced upon said note in the name of said Paris, against the said Orson G. Hulett, and a judgment was recovered in said suit, against the said Orson G. Hulett, at the April Term, of the Rutland county court, 1852, for the sum of two hundred and sixty dollars and seventy-eight cents damages, and twenty-two dollars and eighty-two cents cost of suit. That the said Hervey Paris took out an execution upon said judgment, against the said Orson G. Hulett, dated the 25th day of October, 1852, and on the 23d day of December, 1852, caused the same to be levied upon said Hulett's lands.

It appeared, that the said levy was made upon the equity of redemption of two distinct parcels of land; and that said two parcels of land were encumbered by a mortgage from said Hulett, to one David Whedon, Jr., dated March 27th, 1851. It further appeared, that said mortgage deed also included, besides the two parcels of land, a third parcel, which consisted of certain premises which previous to the 2d day of May, 1845, were owned in fee by one Paul Hulett, and which on the said 2d day of May, 1845, were leased by the said Paul Hulett to one Sheldon and Abram Edgerton, by a perpetual lease, reserving to the said Paul Hulett an annual rent of sixty-seven dollars and sixty-two cents per annum, with a condition in said lease, that if the said rent remained due and unpaid, for the space of more than ten days, that the said lessor might re-enter, and the said lease become null and void. The said lease also contained a proviso, that if the said Sheldon and Abram should choose to purchase said premises at any time, they might do so upon the payment of a certain sum of money, therein mentioned. It also appeared, that said Paul Hulett conveyed said lease-hold estate, on the 9th day of May, 1845 to said Orson G. Hulett.

It appeared, that the said levy was made upon the equity of redemption, in the two first mentioned parcels of land only, without regard to said lease hold estate, treating the said mortgage from the said Orson G. Hulett to the said David Whedon, Jr., as containing only the said two first mentioned parcels of land, in making the levy, and in estimating the value of the equity of redemption aforesaid. That the lands of the said Hulett were at the

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time of said levy, and are now under attachment, in favor of said Hulett's creditors.

Upon the foregoing facts, the court,—PIERPOINT, J., presiding,—rendered judgment in favor of the plaintiff to recover of the defendant, the sums recovered by the said Paris against the said Orson G. Hulett in the said suit, and satisfied by said levy, being the said sums \$260,78 damages, and \$22,82 costs of suit, as damages, and his costs.

Exceptions by defendant.

C. B. Harrington and F. Potter for defendant.

J. B. Bromley for plaintiff.

The opinion of the court was delivered by

REDFIELD, Ch. J. In regard to the legality of the levy, although there might have been some ground of doubt, as to the proper mode of making it originally, it seems to us the creditor selected the only practicable one. The lease-hold estate is not included under the general definition of "real estate" in the statute in regard to the levy of executions. Those terms, by § 20 include only such estates, as are made subject to the levy upon the land itself, by § 19. But the "rents, issues, and profits of real estate, leased for life or years," reserving a rent, are by § 89 made liable to be levied upon in a particular mode, by compelling the tenant to attorn to the creditor, and pay him the rents, until they shall extinguish the debt and costs. And if the rent is perpetual, and less than the annual interest on the execution, the officer may endorse an amount equal to the sum of which the rent is the annual interest, satisfied. And the mortgage of this estate, by metes and bounds, as was done in this case, would seem to be only an assignment of the rent, and as a mortgage in this state does not confer a power of sale, the mortgagee could only receive the annual rent, and might enforce his debt upon the other pieces of land: so that the mortgage would stand very much, as if it had been only upon the other two pieces of land, and this portion of the security had been by a separate instrument, or even by a pledge of personal property. The estate in the lease-hold property is so diverse from that in fee, that it could not be reduced readily to the same denomination, so as to admit of a levy, upon an undivided

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portion. The mode of levy upon the two kinds of estate is altogether dissimilar.

The modes of levy are as dissimilar as that upon real and personal estate almost. So that there would be almost the same embarrassment in levying upon an undivided portion of the equity of redemption, as if the same mortgage had also included bank, or railroad stock, or other personal security, more or less issuing out of real estate, or altogether independent of all connection with the realty. We do not now perceive, how any available levy, upon the equity of redemption, could have been made, different from the one made.

II. In regard to the mode of declaring, it no doubt, at one time, in the history of the law, would have been regarded insufficient. But since it was determined, that giving another security, paying the debt in any other property, would enable the surety to maintain general assumpsit, for money paid, it must be regarded, as quite indifferent how the surety extinguishes the debt. If he do it, in any mode, it is, so far as the principal is concerned, equivalent to the payment of money for his benefit, and at his request.—*Anslie v. Wilson*, 7 Cowen 662. *Randall v. Rich*, 11 Mass. 498.

III. This court have held, that the surety may recover costs which have been incurred, in good faith, and the same rule prevails elsewhere. *Winn, Admr. v. Brook*, 5 Rawle 106. *Hayden v. Cabot*, 17 Mass. 169. If when a surety was sued, upon the debt of his principal, and was unable to pay it, and the same went into judgment, and was levied upon his land, he must lose all costs recovered, and the expense of the levy, because, he did not pay the principal's debt, more promptly, than the debtor himself whose duty it was to do it, and save the surety all trouble, it would certainly afford a remarkable instance of absurd refinement, not to say refined absurdity, and if the debt may be recovered as money paid, so equally may the costs.

Judgment affirmed.

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LYMAN FARR v. BENJAMIN STEVENS.

Book Account. Payment.

Where the defendant bought of the plaintiff a yoke of oxen for \$95,00, and gave the plaintiff \$5,00 in money, and a note which the defendant held against N. for \$90,00, payable to the defendant or bearer, in three months from date, which note the defendant indorsed, and the plaintiff accepted and received the same, and N. having failed to pay the note when it became due, the plaintiff commenced an action on book account, to recover the price of the oxen—*held*—that the delivery and acceptance of the note and money operated as payment for the oxen, and that no action for the price of the oxen, upon the original claim, could be sustained.

The rule would be otherwise, if the note had been received by the plaintiff as payment, under any fraudulent representations, as to the solvency of the maker, or if the note had from some inherent vice, such as illegality of consideration, forgery, and the like, proved unavailable; as in all such cases, the vendor may treat it as a nullity, and sue on the original indebtedness.

BOOK ACCOUNT. This action came to the county court by appeal from the decision of a justice of the peace. Judgment to account was rendered in the county court, and an auditor was appointed, who reported substantially the following facts:

That in the month of January, 1851, the defendant purchased of the plaintiff a yoke of oxen, for \$95,00, that he paid the plaintiff \$5,00 in cash at the time of the purchase, in part payment for the oxen, and also, at the same time, let him have a note against one J. E. Nelson, dated January 11, 1851, for \$90,00, payable in three months from date to the defendant or bearer, which covered the balance of the price of said oxen; that said note was indorsed by the defendant, Stevens, and left by him with one Ives, at the time of said purchase, who soon after delivered said note to the plaintiff, and that the same has remained in his possession to the present time. That when said note fell due, the same was not paid by said Nelson, and that said Nelson failed and became insolvent, about the first of July, 1851; that the defendant informed the plaintiff that he had notified said Nelson that he had let the plaintiff have said note, and that the same was the property of the plaintiff, which notice was given before said note became due, and that the plaintiff never called on said Nelson for payment of said note, nor took the necessary legal steps to hold the defendant as indorser of the same; but that soon after said note

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became due, the plaintiff notified the defendant that said Nelson had not paid the same.

That at the time of the trade for the oxen, the plaintiff hesitated about receiving the Nelson note, for the reason that he knew nothing about said Nelson, or his responsibility, and that the defendant thereupon said, if Nelson did not pay the note, he would pay it, and that the plaintiff replied that he would take the note upon those terms; that the defendant said, he would back over the note, to which plaintiff replied, that he did not care about that, but defendant insisted that this was his way of doing business, and said, he would indorse the note and leave it with said Ives, which he did, as before stated. That the contract of sale was made betwixt the parties in the highway near said Ives' house, in Brandon, while the plaintiff was sitting in his cutter, and he drove on towards home as the defendant went into Ives' house to indorse the note.

That if, in view of the foregoing facts, the court shall be of the opinion that the plaintiff is entitled to recover, in the action of book account, for the balance of the price for the oxen sold defendant, and also, that the delivery of said note, as set forth, should not be treated as payment of said balance, then the auditor found for the plaintiff to recover \$—— from the defendant, to balance book accounts between the parties.

But if the county court shall be of opinion, either that the action of book account will not lie, or that the receipt of said note by the plaintiff was legally a payment of said balance, then the auditor found nothing due from either party to balance the book accounts, &c.

The County Court, April Term, 1853,—PIERPOINT, J., presiding,—rendered judgment on the report for the defendant.

Exceptions by plaintiff.

E. N. Briggs for plaintiff.

A note of a third person given for goods is not a payment therefor, unless it be expressly agreed that it shall be so received. 3 U. S. Dig. 121. 7 U. S. Dig. 393-4. 8 U. S. Dig. 297. 9 U. S. Dig. 359. *Torrey v. Baxter*, 13 Vt. 452.

If a note is not treated as a payment, the vendor may resort to his original right of action.

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The facts reported are, that defendant purchased the oxen at the price of \$95, and paid \$5 as part payment; and defendant let the plaintiff have a note against Nelson, not as a payment, for the plaintiff refused or hesitated to take the note—upon which the defendant said he would pay it, if Nelson did not.

It is evident that the plaintiff did not take the note in payment. Nor did he take the note as indorsee, but disclaimed to do so.

The plaintiff cannot be charged with laches in not presenting the note, or in giving notice, as he did not take the note as indorsee, or assume any obligations to look after it.

If he had any duty to perform, he performed it by giving notice to the defendant that the note was not paid, before the failure of Nelson; and did not look to Nelson, or call upon him for it.

Parker & Nicholson for defendant.

I. It is insisted by the plaintiff, that the verbal promise of the defendant to pay the note, if Nelson did not, entitles the plaintiff to the right of maintaining this action for the balance of the price of the oxen, on Nelson's neglect to pay the note.

What the effect of such a promise might have been, independent of other considerations, is wholly immaterial in view of the facts reported by the auditor. The note was subsequently indorsed by the defendant, and in that condition received by the plaintiff. This indorsement includes and supersedes the previous verbal promise, and all the rights and liabilities of indorser and indorsee arise between the parties. *Curtis v. Ingam*, 2 Vt. 287. *Hutchinson v. Olcott*, 4 Vt. 549.

The indifference of the plaintiff in regard to the defendant's "backing over" the note, can in no wise affect the result. The plaintiff's receiving the note regularly indorsed, as the defendant insisted he should, if he received it at all, imposes upon him the obligation of receiving it under all the restrictions of a technical indorsee, and the fault was his own, if he neglected to take the necessary steps to hold the defendant as indorsee.

II. But it will be seen that the promise of defendant was not in any event to pay for the oxen in any other way than by the note, but it was to pay the note itself, if Nelson did not.

The promise to pay the note was made subject to a contingen-

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cy, that might, or might not arise, and no right to charge *anything* on book existed at the time, and no contingency arising from the happening of some future event, would make the charge admissible. *Slason v. Davis et al.*, 1 Aik. 73. *Nason v. Crocker*, 11 Vt. 463.

And there is no aspect of the case that brings it within the rule established by this court, giving a party the right to charge a promissory note on book. *Barlow v. Butler*, 1 Vt. 146. *Ferrand v. Gage*, 3 Vt. 326.

The opinion of the court was delivered by

ISHAM, J. The auditor has reported a balance of account due the plaintiff, subject to the question whether that balance, upon the facts reported by him, has been paid or satisfied. There has not been so great disagreement between counsel, as to the law governing the case, as there has been in relation to the facts found by the auditor; and different constructions, in that respect, have been given to the report. If any doubt existed as to the facts in the case, a recommitment would be necessary; for it is not within the province of this court to ascertain and determine them. We apprehend no reasonable doubt can exist on this subject. In the month of January, 1851, the parties negotiated for the sale and purchase of a yoke of oxen. The mode and manner of payment was a part of their mutual arrangement. The price of the oxen was fixed at \$95, and payment for the same was proposed in a note against one Nelson, for the sum of \$90, payable to the defendant three months after date. The plaintiff then agreed, that if Nelson did not pay the note he would, and proposed to give his liability thereon by indorsing the note; and insisted, if his liability was required, that it should be given in that way. In that manner, the liability of the defendant was finally given. The note was indorsed by him, and accepted and received by the plaintiff. These facts we must consider as found in the case; and from them it is evident that the indorsement of the note was assented to by the plaintiff, as the manner in which he was to have the liability of the defendant; and on which the plaintiff expressed his willingness to receive the note, with the five dollars in money, in payment for the oxen. On these facts, there can be no doubt, but that the acceptance of the note and money operated as payment

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for the oxen; and that no action for the price of the oxen, or upon the original claim, can be sustained. The remedy of the party is to be had upon the defendant's indorsement of the note, or his guaranty, whatever may be the form in which his liability on the note is given. This principle applies in all cases where payments of this character are made upon a claim which arose at the time of payment; and where, as in this case, it appears that the acceptance of the note, was a matter insisted upon as one of the terms or conditions of the purchase. *Wiseman v. Lyman*, 6 Mass. 286.

In *Hutchins v. Olcott*, 4 Vt. 549, it was ruled "that a promissory note given and received in payment of an antecedent debt, is a bar to an action on that account, whether the note be paid or not; and if a person accept a note in satisfaction of his debt, he is paid by his own agreement, and cannot sue for his original debt, if there be no fraud or deception in giving the note,"—and surely, the force of this principle is not abated, where property purchased is paid for at the time, by a note of a third person, indorsed by the purchaser, which the vendor agreed to receive in payment. The rule would be otherwise if the note was received as payment under any fraudulent representations, as to the solvency of the maker; 4 Vt. 549,—or if the note proved unavailable, from some inherent vice; as illegality of consideration, forgery, and the like. In all these cases, if the defect was known to the debtor, and unknown to the creditor, the transfer of the note will not operate as payment, but the creditor or vendor, may treat it as a nullity, and sue on the original indebtedness. *Gilman v. Peck*, 11 Vt. 516. 15 Mass. 75.

In the cases of *Heald v. Warren*, 22 Vt. 413, *Tracy v. Pearl*, 20 Vt. 163, it was held, that where an order or draft was drawn by the debtor on a third person to pay a given amount to the creditor, that such draft would not operate as payment, when it was drawn without funds in the hands of the drawee, or if it was done, as a mere matter of accommodation, such a draft will not merge the original claim "for the best reason in the world, the parties did not so intend it." The giving of such a draft, will be treated as a fraud. 2 Smith's Lead. Cas. 55, (note.)

There is no pretence in this case, but that the note transferred to the plaintiff, was justly due; that the maker at that time was

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solvent; and that no fraud was practised by the defendant, to induce the plaintiff to take the note. But on the contrary, it is expressly stated, that on the defendant's giving his personal liability to pay the note, and in the mode it was given, the plaintiff agreed to take the note in payment. Under these circumstances, the delivery and indorsement of the note was a merger of the original claim for the oxen, and the remedy of the plaintiff is upon the note against the maker, or upon the indorsement against the defendant.

Whether the plaintiff has made the note his own, as against the indorser, by any neglect to pursue the maker, we are not called upon to decide, as we are satisfied the action on book cannot be sustained, for the price of the oxen.

The judgment of the County Court is affirmed.

DANIEL LINCOLN v. REUBEN R. THRALL.

The plea of Pnis Darrein Continuance, its effect &c.

The plea of *pnis darrein continuance*, in its legal effect, is a waiver of all previous pleas, and the cause of action on the record, stands admitted to the same extent, as it would have been, if no defence had been urged other than that set up in the plea itself; such a plea, in fact, strikes from the record, by operation of law, all previous pleas, and everything stands confessed, except the special matter contested by the plea.

And the fact, that a plea of the *general issue* was filed with the plea of *pnis darrein continuance*, will not effect the rights of the parties.

The plea of *pnis darrein continuance*, in the present case, goes to the plaintiff's right of action—*Quære*—Whether the rule would not have been different, if it had simply effected the plaintiff's remedy.

ASSUMPSIT, on a promissory note payable in installments, to recover the first payment speckled in said note.

At the September Term, 1851, of the county court, the defendant pleaded the general issue, and also an independent plea of *pnis darrein continuance*, in bar to the suit. The court overruled the last mentioned plea, and the defendant reviewed.

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At the September Term, 1852,—PITTMAN, J., presiding,—the cause was tried upon *demurrer* to said last named plea, and the court adjudged said plea insufficient, and the cause was continued to the April Term, 1853, of said court. And at said April Term, on trial of the general issue, the plaintiff insisted, that he was entitled to a judgment, in his favor, in chief, in said cause, and that the judgment against the defendant upon said plea precluded him from making further defence in said cause; and that said plea *puis darrein continuance* was a waiver, on his part of all other pleas or defences.

The court refused so to rule, and the plaintiff thereupon became non-suit, under a rule that he have leave to move to set the same aside, and for a new trial, if the court erred in the ruling aforesaid.

The record of the county court, which was made part of the bill of exceptions, was as follows:

“Entered in court April Term, 1850.

Verdict for defendant, and Review by plaintiff April Term, 1851.

Jury not agreed—Continued—Plea *puis darrein continuance* filed 18th Sept.—September Term, 1851.

Judgment for plaintiff—Review by defendant April Term, 1852.

Judgment that plea in bar is insufficient, September Term, 1852.

Non-suit, with leave to set aside—Exceptions by plaintiff April Term, 1853.”

The plaintiff having made the motion aforesaid, the court overruled the same.

Exceptions by plaintiff.

Parker & Nicholson and *M. G. Everts* for plaintiff.

A plea “*puis darrien continuance*” is a waiver of all previous pleas, and no advantage can afterwards be taken of them. 1 Chitty's Plead. 653. *Culver v. Barney*, 14 Wend. 161. *Kimball v. Huntington*, 10 Wend. 675. *Webb v. Steele*, 13 N. N. 280. *Spafford v. Woodruff*, 2 McLean 191. *Scott v. Brokan*, 6 Blackf. 241. *Den v. Sauderlin*, 8 Harr. 426. *Saddler v. Fisher*, 3 Ala. 200. *Renner v. Marshall*, 1 Wheaton 215. 1 Salk. 168. 2 Stra. 1105. 1 Marsh. 70, 780. 5 Taunt. 338.

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W. H. Smith for defendant.

I. The claims of the plaintiff, in this matter, rest solely upon the most subtle technicality, and are entitled to no favor.

This plea, however it may be drawn, filed or entitled, is not a plea "*puis darrein continuance*." It is a special plea, pleaded to the further maintainance of the suit, and for which there are authorities and precedents.

The distinction between these pleas, runs through the books. If matters of defence arise *after suit is brought*, "but *before plea*, it is to be pleaded as to the further maintainance of the suit."

If "*after plea* pleaded and *before replication*, or *after issue joined* it is *puis darrein continuance*." 1 Chitty's Plead. 695-6. 20 Johns. 414. 7 Johns. 198, note and cases cited. 4 East. 502.

This plea was not filed after any other plea had been, but this and the *general issue* were filed in one paper, at the same time.

II. The text or dicta upon which the plaintiff relies is hardly sustained by the adjudged cases to which it refers. The first case in which this plea is said to be a *waiver* of the former pleas is in 1 LD. RAYMOND 698; and for authority in this case, the court refer to the opinion of CH. J. HOLT, in a case in Moore 871, where it is only decided that the plea, *puis darrein continuance* cannot be pleaded after a *demurrer*, which doctrine has long since exploded. Whenever since, this point has been raised, it has been by *mere dicta* of the judge; and no adjudged case, it is believed, can be found in which that principle has been distinctly recognized.

In *principle* the plea *puis darrein continuance* is not different from any other pleading or defence, except as to the time when the defence, so to be pleaded, arises. *Paris v. Salkeld*, 2 Wilson 188.

The dicta relied upon presupposes that the defence so arising must be an *absolute unquestionable perfect defence*; and that the party brings it to the notice of the court, and seeks their opinion whether it be such defence or not, under the penalty of forfeiting all, if he has misjudged.

Such is not the *policy* of the law of pleading in modern times, when the party is permitted to plead double, or any number of special matters of defence. And this view seems inconsistent with the language of the books, when we read, that "whenever

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any matter of defence" &c. shall so arise &c., the party may so plead, &c. 1 Chitty's Plead. 696.

It fully appears from the record in this case, that *neither* party apprehended the law, as now claimed by the plaintiff, till in the midst of a jury trial; the court, unless impelled by inflexible principles of law, should not sacrifice the cause for the technical error, (if there is one,) committed by the defendant: but if necessary permit the defendant to withdraw the plea, and take a trial upon the general issue, or render such judgment as will upon the *whole record* best subserve the ends of justice, disregarding technical errors. 4 East. 502.

The opinion of the court was delivered by

BENNETT, J. This case stood upon the general issue, and at the September Term, 1851, a special plea of *puis darrien continuance* was filed, which upon *demurrer* was held bad; and the question now is, whether the plaintiff thereupon became entitled to a final judgment against the defendant, notwithstanding the plea of the general issue. From the record of the county court, which is a part of the bill of exceptions, it appears there had been one jury trial, and a verdict for the defendant, before this plea was filed; and now the plaintiff claims he should have judgment for his demand. We think a plea of this description is in legal effect a waiver of all previous pleas, the cause of action on the record stands admitted to the same extent, as it would have been, if no defence had been urged, other than that set up in the plea of *puis darrein continuance*; and the effect of such a plea is to strike from the record, by operation of law, all previous pleas, and everything stands confessed, except the special matter contested by the plea. This is fully established by the cases cited in argument. The principle is, that the defendant has only a qualified right to avail himself of matter to be contested by means of a plea, *puis darrein continuance*; and to avail himself of such matter, he is required to yield up the cause, in all other respects.

It is now said in argument that this plea, though in form a plea, *puis darrein continuance*, still in legal effect it is but a plea in bar simply of a further maintenance of the action, and that the court should so treat it; but we think not. The case at the previous

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term before this plea was filed had been at issue, and tried and a verdict for the defendant.

The fact, that the defendant, when he filed this special plea, filed anew the general issue should not effect the rights of the parties. It was none the less a waiver of all other defences.

The plea in this case goes to the plaintiff's right of action; and does not simply affect the remedy. If it simply affected the remedy, the case might merit a different consideration.

The result is, the judgment of the county court is reversed, and the rule for setting aside the non-suit is made absolute, and the case remanded to the county court.

HARVEY PARIS v. ORSON G. HULETT.

Principal & Surety. Foreclosure, by bill in Chancery or by Ejectment, its effect upon Mortgage notes.

It is settled law in this state, that a decree in chancery, and an expiration of the time of redemption, and a possession taken under the decree, operates as a satisfaction of the mortgage notes, if the property is adequate for that purpose, and if not adequate, it operates as a payment *pro tanto*.

And the effect of a decree of foreclosure is the same, whether obtained upon a bill in chancery, or in an action of ejectment.

Where the surety on a note takes a mortgage from the principal debtor, conditioned that he will pay the note, and save the surety harmless, a trust is thereby created, and also an equitable *lien* on the lands for the benefit of the creditor, and the surety as mortgagee, holds the property subject to such trust, and equity will compel him to give the creditor the benefit of such *lien*, for the security and payment of his debt; and if the surety voluntarily assigns the mortgage for this purpose, the effect will be the same, as if the assignment had been made under a decree in chancery.

The case of *Lovell v. Leland*, 3 Vt. 581, considered and affirmed; and *Strong v. Strong*, 2 Aiken 378, modified and overruled so far as it conflicts in principle with the doctrine held in *Lovell v. Leland*.

ASSUMPSIT on a promissory note. Plea, the general issue, and trial by the court, April Term, 1858,—PIERPOINT, J., presiding.

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On the trial, the plaintiff introduced in evidence, the note declared on, which was signed by one E. F. Clark, Orson G. Hulett, the defendant, and one Rich Weeks.

The defendant then offered testimony for the purpose of showing that this note was the proper debt of the said E. F. Clark to pay, the defendant and said Weeks being sureties only. That previous to this note being given, said Clark had mortgaged certain premises in Pawlet to one Isaac McDaniels, to secure the payment of about \$1400, and had subsequently mortgaged the same, with other premises to the said Weeks, to secure certain liabilities said Weeks was under for said Clark, all of which had been discharged, except his liability on the note in suit.

That subsequent to the giving of this note, by an arrangement between said Weeks, the plaintiff, and the defendant, the said Weeks assigned and transferred his mortgage from said Clark to the plaintiff, to secure the payment of the note, upon which this suit was brought. That about the same time, the plaintiff purchased of said Isaac McDaniels, and became the owner of the mortgage from said Clark to said McDaniels, upon which he commenced a bill of foreclosure in the name of McDaniels against Clark, and at the September Term, 1851, of the court of chancery, obtained a decree of foreclosure, to expire on the 27th day of August, 1852. That at the April Term, of the Rutland county court, 1852, the plaintiff brought his action of ejectment against said E. F. Clark, founded on and for recovery of premises, described in the mortgage from said Clark to said Weeks, and obtained a judgment, after the rendition of which, the said Clark interposed his motion to redeem, and the amount due on the note in this suit was computed and reported as the amount due to the plaintiff, in that suit, and the time of redemption limited to the 15th of May, 1852; at the expiration of which time the plaintiff took out a writ of possession, and the said sum, not having been paid, the plaintiff took possession of the said premises; and that, on the 27th day of August, the decree of foreclosure on the first mortgage became absolute by the neglect of Clark to pay the amount therein decreed; and that the value of the premises thus recovered, was more than sufficient to pay the amount due on said mortgages and this note.

To this testimony the plaintiff objected, and the court excluded

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the same, and rendered judgment for the plaintiff, for the amount of the note.

To all which the defendant excepted.

C. L. Williams and J. B. Bromley for defendant.

The value of the property above previous incumbrances is more than enough to pay this note. Is the plaintiff accountable for its value in or towards the satisfaction of his debt?

Had the property been mortgaged by Clark to the plaintiff directly to secure this note, and the plaintiff possessed himself of it as he has done, there could, we apprehend, be no question as to the obligation of the plaintiff to account for it at its value. *Lovell v. Leland*, 3 Vt. 581.

The whole transaction was such as to place the plaintiff in the same situation as to his liability to account, as he would have been in, had the mortgage been to him directly. At the time of transferring the mortgage to the plaintiff, Weeks held it for the security of his liability on this note alone. The defendant as his co-surety had an equal equitable interest in it with him.

The plaintiff was entitled in equity to the benefit of this security for the payment of his note. *Maure v. Harrison*, 1 Eq. Cases Abr. 98. *Eastman v. Foster*, 8 Metcalf, 20.

This the plaintiff might have availed himself of or not as he chose. He did do so, and by an arrangement between all the parties interested in the security, he accepted a transfer of it, and adopted it as his own, foreclosed the mortgage in his own name, and this property is sufficient to pay his debt.

Clark has no claim upon the property, he having been foreclosed. The defendant and Weeks have no claim upon it, the debt upon which they are liable having been paid with it, as the property of their principal.

The property then is wholly and absolutely the plaintiff's, and shall he be permitted to collect its value again from this defendant? If he cannot collect the note of Clark, the principal, he surely cannot of the defendant, who is merely Clark's surety.

F. Potter and Edgerton & Allen for plaintiff.

I. When a mortgagee brings an action of ejectment to recover possession of mortgaged premises, and the defendant applies for

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time to redeem, and does not redeem, the debt secured by the mortgage is not thereby discharged. *Strong v. Strong*, 2 Aik. 373.

There is a difference between a foreclosure at law and in chancery. *Lovell v. Leland*, 3 Vt. 581.

II. In this case the foreclosure of the mortgage assigned by Weeks to the plaintiff, was for the benefit of Weeks, the plaintiff holding the same as collateral security for the payment of the note in this suit. The plaintiff is under obligation to re-assign the premises to Weeks, if he recovers the amount of the note in this suit. The plaintiff has not foreclosed the equity of redemption of Weeks in the premises. Weeks and the plaintiff stand in the relation of mortgagor and mortgagee, with respect to the premises in question. 6 Vt. 448. *Brayton* 163. 9 Vt. 276. 13 Vt. 341. 1 Paige Ch. R. 48.

The opinion of the court was delivered by

BENNETT, J. Whatever may have been the previous opinion, the case of *Lovell v. Leland*, 3 Vt. 581, settled the doctrine that a decree in chancery and an expiration of the time of redemption, and possession taken under the decree, operated as a satisfaction of the mortgage notes, if the property was adequate for that purpose: and if not, *pro tanto*. But it is now claimed that the principle adopted in the case of *Lovell v. Leland*, should be confined to cases where the decree of foreclosure is had in the court of chancery, that the case of *Lovell v. Leland* may stand consistently with the case of *Strong v. Strong*, 2 Aik. 373. But it may be remarked, that the case in Aiken is not put upon any peculiar distinction of the effect of a decree of foreclosure, whether made in a court of chancery or in a court of law, in an action of ejectment. The court evidently went upon the ground, that as a general principle a foreclosure of the equity of redemption was not a satisfaction of the mortgage debt, unless the mortgagee elected to treat it as such.

But this was not the principle point in the cause, and was evidently passed off without very full consideration.

We apprehend, that in principle the cases are opposed; and that there is no good ground for a distinction between them; and for one, I think, it is as well to overrule a case, if found to be un-

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sound, directly, as to do it indirectly. The effect of a decree of foreclosure must be the same, whether obtained upon a bill in chancery, or in an action of ejectment.

The only reason which occurs to me, that can be assigned for a distinction is, that in one case the primary object of the proceeding is to cut off the equity of redemption, and in the other to get possession of the mortgaged premises. But if the mortgagee elects to sue in ejectment, he knows that he gives to the mortgagor an election to surrender up the possession upon the recovery in ejectment, or to come in with his motion to redeem, and thereby suspend the writ of possession; and in such case the statute enacts, if he does not pay the sum found due, by the time fixed by the court, his equity of redemption shall be foreclosed. If the mortgagee in either case should abstain from going into possession the mortgage debt would, no doubt, not be satisfied.

But in the present case possession followed the foreclosure, and we are to take it on this bill of exceptions, that the property was ample to satisfy the debt.

But it has been said, that as the mortgage was given by Clark to Weeks to indemnify him for signing this note, as one of the co-sureties with the defendant, and by Weeks assigned to the plaintiff, and the action of ejectment brought by the plaintiff, as assignee of the mortgage, the principle will not apply, however it might be in other cases. We think that when this mortgage was executed by the principal debtor to one of the co-sureties on the note, conditioned that he would pay the note and save the surety harmless, a trust was thereby created, and also an equitable lien on the lands for the benefit of the plaintiff, and that the surety as mortgagee held the property subject to such trust, and that he might in equity be compelled to give the plaintiff the benefit of such *lien* for the security and payment of his debt; and if the mortgagee has voluntarily done what he might be compelled to do, the plaintiff most certainly should have the same benefit from the act, that he could have had if the assignment had been made under a decree in chancery.

That the plaintiff had such an *equitable lien* on the mortgaged premises, is too well settled to need authority. The case cited from the 8th of Metcalf p. 20, is directly in point. As this *equitable lien* was to secure the payment of the note from the princi-

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pal, the amount due on the note was the sum which the principal debtor was bound to pay before the lands could be released from the mortgage; and this note has been in legal effect paid by the principal, by means of the mortgage property, and the surety must of course be discharged.

Judgment of the County Court is reversed.

DANIEL TAYLOR & OTHERS v. RUTLAND, MENDON & OTHER TOWNS.

Petition to take the franchise of a Turnpike Co. Rule of apportionment, when it is in several towns.

In apportioning the expense of making a turnpike, under the provisions of the statute a free road, where the same is in several towns, it is the value of the franchise lying in the several towns, which should be the governing rule in the apportionment.

PETITION under the statute, (Comp. Stat. 174, Chap. 22 § 68 and 69,) for taking the franchise of a certain Turnpike company lying partly in Rutland and several other towns. The facts and the questions raised and passed upon, sufficiently appear in the opinion of the court, which was delivered by CHIEF JUSTICE REDFIELD.

C. L. Williams for petitioners.

W. H. Smith for Rutland.

BY THE COURT, REDFIELD, Ch. J.—This is a proceeding by petition to take the franchise of a Turnpike company lying partly in all the towns, but very unequally, and much less in Rutland, than in the other towns. The committee have appraised the franchise, at a sum, which seems to be satisfactory to all concerned. The only question made is, in regard to the rule of apportionment among the several towns. The statute allowing the franchise to

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be taken is not specified, as to the mode of apportionment of damages, between different towns. The statute, (Comp. Stat. 174, Chap. 22 § 63,) provides, that the franchise may be taken, the same as other estate in lands, "and the same rules shall be observed, in making compensation, as are now granted, and provided, in other cases." The committee say, "that in making the apportionment, they had reference to the benefit to be derived to said towns, by the establishment of said highway, and adopted, as a general basis of the apportionment the respective grand lists of said towns, believing, that this afforded, as equitable an apportionment, as could be adopted, to meet the views, and opinions, of the committee."

This may indeed be very obviously proper; but the inference is not as natural a one as could be desired. If the purpose of the committee had been to apportion the burden according to the ability of the several towns, the course taken is a very intelligible one. For there is an apparent connexion between the premises and the conclusion. But how there is any general connexion, between the grand list of several towns, and the benefit to arise to such towns, by converting a turnpike into a free road, is certainly not very obvious. And although it may be true, that in this instance they happen to coincide, the coincidence must be regarded, as rather fortuitous, than necessary, or natural, as it seems to us.

As there is then no connexion, between the benefit to the towns and the amount of the grand lists of such towns respectively, we think such a false basis of apportionment should be stricken out of the report, lest it might hereafter be drawn in as a rule of apportionment, fixed by this court.

It seems to us, that it is the value of the franchise, lying in the several towns, rather than the benefit to be derived, by the towns, from making the turnpike a free road, which should be the governing rule in the apportionment. The benefit here spoken of is not, we suppose, a corporate benefit. For in that sense the thing is more a burden, than a benefit. But it is probably meant, a benefit to the inhabitants and to the business by the use. And hence there may be an evident coincidence, between the value of that portion of the franchise, in a town, and the relative benefit to the town, but being merely accidental, the case should rather be left to stand upon the value of the franchise.

And hence it is sufficiently obvious, that the rule proposed by

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the town of Rutland, to appraise according to the length of way, is not a just one. It is apparent, that the portion of the road, near a populous town, must be far more valuable, than one in a remote mountain district, of the same length. So that, in fact, the actual value of the franchise, in the several towns, may come at very much the same, as the present apportionment. But we think the case should be recommitted, to the committee, to apportion the franchise, according to the value of the portions, lying in the respective towns.

Report set aside and recommitted for a new apportionment.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF BENNINGTON.
FEBRUARY TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

ISAAC McDANIELS v. GEORGE W. ROBINSON.

The Liability of Innkeepers. What constitutes the relation of Guest. The extent of the Responsibility of Tavernkeepers for goods stolen or lost.

The relation of guest is created by a person's putting his horse at an inn, and it will be extended to all his goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time.

Therefore, it is not necessary that the traveler should take all his meals at the inn, or lodge there every night, in order to create the relation, or constitute himself a guest.

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And though the property or money of the guest may be lost by a burglarious entry of the innkeeper's house, under such circumstances as to excuse him from all negligence, and also from liability to his guest, still he cannot be exonerated from the loss of the goods upon presumption merely, or without proof of some of the circumstances ordinarily attending the breaking of a house securely fastened.

The delivery and acceptance of the goods are a sufficient consideration for any undertaking in regard to them, even when the service is gratuitous.

In the present case, the plaintiff delivered a sum of money to the defendant to keep, and after he had so delivered the money, and defendant had accepted it, the plaintiff requested defendant to take the money to one Dr. Swift, to keep over night, and the defendant agreed so to do; *it was held* that this new contract was not inconsistent with the continuance of the former one, and only provided a new mode of discharging the former one, and that it produced no effect upon it unless or until performed.

What constitutes the relation of guest, and also the extent of tavernkeepers' responsibility for goods stolen or lost, considered and discussed.

The parties being made witnesses in this state, are witnesses to every point material to the determination of the case.

ASSUMPSIT for \$4,000, it being two hundred twenty dollar gold pieces, left with the defendant, who was an innkeeper, for safe keeping.

Plea the general issue and trial by jury.

On the trial, the plaintiff offered testimony tending to prove that from the 26th day of February 1851, to the 6th day of March following, and before and after those dates, the defendant was the keeper of a public inn, at Bennington Center village, in the county of Bennington, but without any license therefor from any civil authority; that on the evening of the said 26th day of February, the plaintiff, whose place of residence was in Granville, in the state of New York, came to said Bennington on business connected with the Stark Bank, which is situated in the village of East Bennington, one mile distant from said inn, went to said inn with an associate, one Thomas C. Robinson, and that they were received by the defendant as guests therein; that the plaintiff brought with him when he so came to said inn, a horse, wagon, harness and buffalo robe, which were also at the same time received by the defendant, and were kept by him at his stables, connected with said inn, from the evening of said 26th day of February, to the said 6th day of March, inclusive; that the plaintiff lodged and took his meals,

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and occupied a room numbered 10, at said inn without interruption, from the time of said arrival until after breakfast on Saturday, the first day of March, when he went out, and was engaged in business through the day in said East Bennington, taking no other meals except breakfast at the defendant's, and at night went to the house of his brother, Thomas McDaniels, in the East Village in said Bennington, one and one half miles from said inn, where he staid until the next following Monday morning after breakfast, when he went to said inn, and dined there on said last mentioned day; that he went back to his brother's to tea, lodged there that night, and took breakfast there the following Tuesday morning. That he returned to and dined at said inn on said Tuesday, and continued there, and lodged and took his meals there, until about half past five o'clock, P. M. of the following Wednesday, the 5th day of said March, when he went back to the house of his said brother to transact some business with him, and took tea there, and staid there through the night; that he returned on the morning of the next day soon after breakfast, the 6th day of said March, and dined and took tea at said inn; that the plaintiff when he first came to said inn, engaged for his use while he should stay at said inn, the said room numbered 10, and during all the time he spent at said inn, as before stated, he occupied said room, both by day and night, and fires were at all times provided for him in said room by the defendant, whenever the plaintiff was at said inn, as aforesaid; that during the whole time, no intimation was given to the plaintiff, that said room was not continuously at his service, and appropriated to his use, and that whenever he was at said inn, as before stated, he resorted to said room and occupied the same without anything being said upon the subject between himself and the defendant, after the original engagement of it, as before mentioned. That on said 5th day of March, in the afternoon, Truman Huling, Esq., brought to said room numbered 10, the sum of four thousand dollars in gold coin, being two hundred double eagles, which was then and there paid to and received by the plaintiff, and was his property; that on the occasion of leaving said inn, on the afternoon of said day, as before stated, the plaintiff delivered to the defendant in said room, the said gold coin tied up in a shot bag; that the defendant said as he took it into his hands, that he did not like to be accountable for so much money; that

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thereupon the plaintiff took it, enveloped it in a newspaper, and handed it back to the defendant, saying there was no danger, and requested him at the time, to put it in the tick of the straw bed, in which he, the defendant, slept, and there to keep it through the night, and not to let any one know it, not even his, the defendant's wife, and stating to the defendant, that he was going to his brother's to transact some business, and should not return to said inn until the next morning, and at the same time directing the defendant in case he, the plaintiff, should not return before the departure of the Troy stage the next morning, to deliver the money to Truman Huling, Esq., to give to the stage-driver to carry to Troy for the plaintiff, the said Huling having agreed so to do; that the defendant then left said room No. 10, taking said money with him, and passed down the stairs and into the back part of his house, that the plaintiff went immediately down said stairs and out upon the front piazza, and near to the front door of the main hall of said house, and as he was going down said stairs, he sent for the defendant, who came to him on said piazza, and the plaintiff then said to the defendant, "your house is more exposed to fire than Dr. Swift's; wont you take the money over to Dr. Swift's and let him keep it over night;" and the defendant replied, that he would right away or presently; that at this time the defendant had not the money in his hand, having just previously placed it in said hall, under a stove, about twenty feet distant from the place where the parties then stood, and within the house, and not in the view, or knowledge of the plaintiff, and immediately the plaintiff and said Thomas C. Robinson left said inn, and went to his brother's, as before stated. That the said Swift's dwelling house stood upon the opposite corner of the street, and within a few rods of said inn, and that said Swift was at home, and would have received and kept the money if it had been brought to him for the purpose, although there had been no previous agreement or conversation between himself and the plaintiff on the subject, and the said Swift had no knowledge of the matter.

The only evidence on this point was the testimony of said Swift, who testified that he did not know any reason why he should have refused to receive the money, and supposed he should have received it, if he supposed the plaintiff wished it, but was glad that it was not brought to him.

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It also appeared that before the commencement of this suit, the money was demanded by the plaintiff of the defendant, and the defendant replied to the demand, that he had not the money, that it had been stolen from his house, and he could not produce it.

The defendant claimed, that said bag of money was stolen from his house on the night of the fifth of March, by a burglarious entry from without said house, and gave evidence tending to prove, that said money was so stolen, with evidence showing the degree of care bestowed by him in the care and keeping of the same.

Also evidence tending to prove that the plaintiff and his associate, Thomas C. Robinson, left the defendant's house on Friday, February 28th, in the afternoon before tea, and that they did not lodge at defendant's house afterwards, but took up their board and lodging at the house of said Thomas McDaniels, in East Bennington, and had their clothes washed and ironed there, and made that their home while they remained in Bennington, after leaving defendant's house on the said 28th day of February; and that the principal business of the plaintiff in Bennington was with the Stark Bank. That on Sunday, the 2d day of March; while the plaintiff and said Thomas C. Robinson, were staying at said Thomas McDaniels, the plaintiff sent the defendant the following letter:

"Bennington 2 March, 1851.

"G. W. Robinson, Esq.

"Sir,—I wish you would let your man harness up my horse, and put all the clothes I have in your house in trunk, traveling bag, or something—also all the papers in table drawer in the room I used, and also all other things Robinson and I have in those rooms, and drive down here this evening and fetch them down. I shall want him to take my horse and wagon back with him.

Respectfully,

(Signed)

"I. McDANIELS.

"P. S. George, it is now dark, and you may send my things in the morning with your own team.

"I. McDANIELS."

That the defendant, in compliance with the request in said letter, on Monday morning, March 3d, sent to the plaintiff, to the house of the said Thomas McDaniels, all the things named in

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said letter, belonging or appertaining to the plaintiff and said Thomas C. Robinson, leaving only the horse, wagon, harness and buffalo robe, which were at the stable of said inn. That after the afternoon of Friday, the plaintiff took only two or three meals at defendant's house, before the delivery of the money, and that the board of the plaintiff at defendant's house from the 26th day of February, to the time of the delivery of the money, was two and a half days only.

That the defendant did not after said Friday afternoon reserve said room for the use of the plaintiff, or the said Thomas C. Robinson, but he had no occasion to use it for any other purpose, and did not appropriate it to any other use until after the 6th of March, but there was nothing said between the parties about its being reserved for the use of the plaintiff, and that the plaintiff did not carry the key of said room. That said Thomas C. Robinson did not return to said inn to lodge, after he and the plaintiff left on the said 28th day of February; that at the time of the delivery of the money to the defendant on the said 5th day of March, the defendant told the plaintiff, he would not be accountable for the money.

There was no evidence other than stated, that either party expected or understood that defendant was to receive any compensation for keeping said bag of money, or for carrying it to Dr. Swift's, or for the use of said room.

The defendant's evidence tended also to prove that at the time the plaintiff requested him to take the money to Dr. Swift's, he told the defendant to let no one else know anything about his having the money; that at ten minutes past eight o'clock of that evening, the defendant saw Dr. Swift upon the piazza in front of defendant's house, in company with another person, A. B. Gardner, Esq., and asked said Swift if he was going to be at home, and the said Swift replied that he supposed he should, or that he knew nothing to the contrary; that the defendant was engaged in his business in and about his house after he received said money, until about nine o'clock in the evening, when he took said bag of money, and started to carry and deliver it to said Swift. That he went over to said Swift's house with the money, and found there was no light in any part of the house, except in the room of a sick hired man of said Swift's, in a remote part of the house, that he found no

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evidence of any one being up, and supposed said Swift had been called away upon his professional business, and that the other inmates of the house had retired to sleep ; that without entering the house he returned with the bag of money to his own house, and put it under his bed. That early in the morning of the 6th of March, upon discovering the loss of the money, he went to the house of said Thomas McDaniels, and informed the plaintiff that the money was stolen.

That at the time of the delivery of the money to the defendant, the plaintiff had concluded his business in Dennington, with said Stark Bank, and was ready to leave for home.

That on said 5th day of March, and for some days previous, it had been extensively known that the plaintiff was at said Dennington, and had a large amount of specie with him, and that the defendant was apprised of the fact. That on the night of said 5th of March, four stage passengers and two other travelers lodged at said inn, besides the stage-driver, a man servant, a maid servant, and a family boarder.

The plaintiff also gave evidence tending to prove, that the defendant was on terms of much intimacy with the family of said Swift ; that the said Swift was not in the habit of fastening the doors of his house at night, and that on one occasion, not long before the said 5th day of March, the defendant entered Swift's house unbidden, in the evening, after the lights had been extinguished for the night, and by invitation of said Swift, after he got to the bed-room door, went into his bed-room, where he was in bed, and there had conversation with said Swift about some business with him.

The counsel for the plaintiff requested the court in writing to instruct the jury, as will sufficiently appear from the arguments of counsel, in several particulars.

The court,—PIERPOINT, J., presiding,—declined to instruct the jury as requested, but instructed the jury, that as the defendant admitted that he received the money of the plaintiff, and did not re-deliver it when it was demanded, alleging that it had been stolen from him, the plaintiff was entitled to recover the \$4,000 and interest, unless the jury should find from the evidence that the money was stolen from the defendant as he alleged. But if the jury should find, that the money was so stolen, then the

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plaintiff would not be entitled to recover, unless the defendant or his servants had neglected to use that care and diligence in the care and keeping of the money which the law required. If the jury find that the defendant was an innkeeper, (which is admitted by defendant,) and the plaintiff was a guest at the defendant's inn at the time the money was stolen, and the loss is *prima facie* through the negligence of the defendant or his servants, and the burden of the proof is on the defendant to prove it was not so lost, the plaintiff is entitled to recover, unless the defendant has proved that the money was stolen without any negligence of his or his servants.

The court also instructed the jury, that if the plaintiff continued the guest of the defendant, from the 26th day of February, to the 6th day of March, or if the relation had ceased, and had afterwards been renewed, and continued to exist at the time the money was stolen, the defendant would be liable in this action, unless he proved that the money was stolen without any negligence whatever of his or his servants. But if the jury find that the plaintiff, and his associate, Thomas C. Robinson, on Friday or Saturday previous to the 5th of March, departed from defendant's house, and went to the house of Thomas McDaniels, and caused the removal of all his effects, as specified in his letter of March 2d, and continued to abide principally at Thomas McDaniels', the plaintiff only taking occasional meals, or lodging a single night at the defendant's house, until the 5th of March, and then the plaintiff delivered to the defendant the package of money, and requested him to keep the same until the next day, and then deliver it to Truman Huling, if he did not himself call for it before the time of the departure of the stage for Troy, and told the defendant he was going to Thomas McDaniels', and had business to transact with him, and should not be at defendant's house again until the next day, and thereupon plaintiff left the defendant's house, and did not return there, until the defendant went to see him the next day; the defendant did not, by receiving the money, incur the peculiar liability of an innkeeper, for the loss of the money, although the plaintiff's horse, wagon, harness and buffalo robe remained at the defendant's barn, connected with his inn.

The court further instructed the jury, that if the defendant re-

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ceived the package of money of the plaintiff, to be by him gratuitously kept until the next day, and then to be re-delivered to the plaintiff, or to Mr. Huling, and the same was stolen from the defendant, the plaintiff not being a guest at the inn, the plaintiff is not entitled to recover, unless the defendant was grossly negligent and careless in the keeping and management of the package, and thereby occasioned its loss, (explaining to the jury what would constitute gross negligence, to which there was no exception,) but if the loss was thus occasioned, the plaintiff was entitled to recover.

That the evidence relative to the undertaking of the defendant to carry the package of money to Dr. Swift, did not prove such a contract, as entitled the plaintiff to recover on either of the two last counts in the declaration.

The plaintiff was sworn and examined as a witness, and his counsel offered to prove by him, that when he delivered the money to the defendant on the 5th of March, and when he left said inn, it was his intention to return thereto the next morning, and although the defendant went to the house of the plaintiff's brother at an early hour the next morning, and informed the plaintiff that the money was lost, that the plaintiff would have gone back to said inn, on said morning, if such loss had not occurred.

This offer was objected to by the counsel of the defendant and was excluded by the court.

The court, in relation to what would constitute a guest, instructed the jury, that it was not necessary that the guest should continually remain in the inn, lodge there every night, or take all his meals there, but the relation of host and guest would continue during such temporary absence, if the effects of the guest brought by him into the inn remained there and he continued to make the inn his principal abiding place, as the inn of a guest, and the innkeeper would be liable as such for all the effects of the guest by him brought or deposited in said inn. That the occasional visits and taking meals at an inn would not necessarily constitute the person making such visits the continued guest in the inn. A man may lodge, take his breakfast and supper at one inn, and take his dinner at another; while abiding in the inn for the purpose of taking his dinner, he is a guest in that inn, and the keeper is liable

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for his effects brought in with him, but the relation ceases when he leaves the inn.

The jury returned a verdict for defendant.

Exceptions by plaintiff.

D. Kellogg and E. Edgerton for plaintiff.

I. The defendant was an innkeeper at the time the money, (which was subsequently lost,) was committed to his keeping, this was not contradicted but admitted on trial.

II. The plaintiff was the guest of the inn from the evening of the 26th of February, until the evening of the 6th of March following, the plaintiff during all that time having his horse, wagon, harness, and buffalo robe at the inn, and his own absence being for temporary purposes, with the intention of returning until his business was completed. 10 Petersdorff. *York v. Grindstone*, 1 Salkeld 388. *Jelly v. Olark*, Cro. Jac. 188. 9 Pick. 280. *Peet v. McGraw*, 25 Wend. 658. Story on Bailments 477. 21 Wend. 282. Chit. on Cont. 477, notes.

III. And if at any time during that period, the relation of innkeeper and guest was suspended, (which we do not admit,) it was renewed on the morning of the 4th of March, and continued until after the money was delivered into the keeping of the defendant, as such innkeeper.

IV. The plaintiff, when he left on the evening of the 5th of March, did so for the purpose of transacting some business with his brother, and so informed the defendant, and at the same time intimated to him that he should return next morning; no doubt was expressed or entertained by either of the parties as to the *fact of returning*; the only contingency related to the time of the return, whether before or after the departure of the stage for Troy.

V. Whether the plaintiff, when he left on the evening of the 5th of March, did intend to return was a question of fact for the jury, and the court erred in not submitting it to the jury as requested, and also, in excluding the evidence offered by the plaintiff on that point. Story on Bailments, § 477.

VI. The court erred in limiting their instructions to the jury, that if the money was stolen *without the fault of the defendant or his servants*, the defendant was not liable. 1. The defendant was innkeeper, was an insurer of the property, and he could exoner-

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ate himself from liability only by showing that the loss was from inevitable casualty or superior force. Story on Bail. § 470 & 482. Jones on Bail. 108-109. 21 Wend. 285. *Mason v. Thompson*, 9 Pick. 280. *Grinnell v. Cook*, 8 Hill 488. *Clute v. Wiggins*, 14 Johns. 175. 2 Kent's Com. 592 and note.

2. At all events, the defendant must show that the loss was not occasioned by his guests or servants or inmates of the inn. *Merritt v. Claghorn*, 23 Vt. 177.

VII. The court erred in directing the jury, that the defendant was not liable upon his promise to carry the money to Dr. Swift, to be kept through the night. 1. The promise was made upon sufficient consideration, the money being left in his hands for the purpose of being carried there. 2. The defendant entered upon the execution of the bailment. Story on Bailments § 187, 171.

VIII. The court erred in instructing the jury, that the defendant was not liable upon the count for money had and received. The defendant having carried the money to Dr. Swift's house in part performance of the bailment, and then having carried it away, without any sufficient reason for not leaving it there as he had agreed to do, his conduct was a deviation from the purpose of the bailment, a misuser, a wrongful conversion. Story on Bailments § 509, 188, 190.

O. L. Shafter and *D. Roberts* for defendant.

Under instructions free from criticism, the jury have found, 1. That the money was stolen from the defendant *as he alleged*, i. e. by a burglarious entry from without the house.

2. That the loss was not occasioned by gross neglect of the defendant, in the keeping and management of the money.

An innkeeper's liability for the loss of his guest's goods rests upon the compensation he receives for the keeping of them. 2 Saund. Pl. Ev. 217. 1 Swift's Dig. 550.

As to dead property this compensation usually exists in the innkeeper's profit upon the personal entertainment of the guest, the entertainment being the principal contract, and the custody of the goods but accessory. 1 Parson's Cont. 627, 629. 1 Bouvier's Ins. 409.

As to live property, as the horse, the compensation may lie in the profit on the keeping of the horse. *York v. Greenough*, 2 Ld.

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Raym. 866. If we may extend this idea of compensation, lying in the profit from the keep of the horse, to the custody of the accompaniments of the horse, as the wagon &c., as was done in *Mason v. Thompson*, 9 Pick. 280, it seems absurd to extend it to the custody of articles connected with the person of the owner, as a bag of gold.

In that case, the principal contract was the keeping of the horse. As to the bag of gold, the principal contract would be the entertainment of the guest.

The better opinion is, that to make the innkeeper liable for the loss of the horse even, the owner must be personally a guest when the horse is left.

BRONSON, J. in *Grinell v. Cook*, 3 Hill 485, denying *Mason v. Thompson*, and endorsing Ld. Holt's opinion in *York v. Greenough*. *Binns v. Pigola*, 9 C. & P. 208. *Smith v. Dearborn*, C. C. B. 132. 1 Parson's Cont. 639, 632. 2 Saund. Pl. & Ev. 216. *Thickstun v. Howard*, 8 Blackf. 535.

We may admit the liability of the defendant for the loss of this horse, and perhaps his accompaniments occurring even after the personal relations of the plaintiff, as guest of the defendant had terminated. They having been left while the plaintiff was a guest, and a profit accruing to the defendant.

As to these, we might call the plaintiff a guest, still. But this is rather by construction and a figure of speech, as it is said in *Gelly v. Clark*, Cro. J. 188, he is reported a guest for that purpose.

For what is a guest, "A lodger, a stranger in an inn." See Jacobs' Law Dict. Tit. *Guest*.

It seems absurd to say, that the horse at the stable makes the owner a guest in the inn.

As to the intent of the plaintiff to return to the defendant's house. The intent, if of any importance, should be more than simply to return to the house; it must be to return to it *as his inn causa hospitandi*.

If the temporary guestship of the 5th of March could be protracted, during absence, by an intent to return, it could only be by an intent to return *as guest*.

The innkeeper must receive the goods in his character of innkeeper, or he is not liable as such. 3. Bac. Ab. Tit. *Inns*, c 5, p.

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666. 1 Cow. Dig. 298. *Williams v. Gesse*, 3 Bing. (N. C.) 849. *Snider v. Geiss*, 1 Yeates 34. 1 Smith's Lead. Cas. 52, 104.

The test is,—Is he bound to receive the goods? 1 Parson's Cont. 629, 630. *Grinnell v. Cook*, 3 Hill 488.

The evidence upon both sides is consistent only with the proposition, that the defendant received the money as an ordinary bailee. Thus it was delivered to him, not because the plaintiff was staying at the inn as a guest, but because he was about to leave the inn, and so cease to be a guest.

The direction almost simultaneous with the delivery, to take the money to Swift's, thus placing it *extra hospitium*, negatives the idea of the delivery being with the defendant in the capacity of innkeeper.

Again, the defendant was not bound to receive the money upon the ground of want of compensation; and therefore having received it, it was in another capacity than as innkeeper. 1 Parson's Cont. 629–630.

The 8d request of plaintiff's counsel to the court to charge the jury, left out the fact that plaintiff had broken up his first relation with the defendant, and that his principal abiding place was then at his brother's.

This was an important fact as influencing the determination of the question, whether the plaintiff was the defendant's guest on the night of the 5th of March. The question is, where was the plaintiff's inn, abiding place, home? Whose guest was he at supper, through the night, and at breakfast?

Guest—"A lodger, or stranger in an inn. Jac. Law Dic. Tit. *guest*.

"A person who stays there under an express or implied agreement to be supplied with his personal wants." 1 Bouvier's Ins. 409.

"A stranger; one who comes from a distance and takes his lodgings at a place." Webster's Dictionary.

"It is the lodging of the man at the inn that makes him a guest." See Ld. Holt in *York v. Greenough*.

The intention to return the next day was in no other way made known, than by the plaintiff's saying that he should not return until the next day. If we may infer from this, that the plaintiff would return the next day, we may as fairly infer, that he would

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not return until after the money had been sent to Troy. But whatever may have been the plaintiff's intention, or however expressed, "yet he was at his liberty, and was not a guest during the time," of the absence. *Gelley v. Clark*, Cro. J. 188.

A burglary is regarded as a superior force, and occurring without fault of the innkeeper, is irresistible force. "Liability does not extend to loss occasioned by irresistible casualty, or superior force as robbery." 2 Kent's Com. 593. 1 Blackstone's Com. 430. 2 Saund. Pl. & Ev. 217.

The charge of the court laid down the correct rule, as to the liability of the defendant—treating it as a question of negligence, not insurance. *Merritt v. Claghorn*, 23 Vt. 177. 1 Rol. Ab. 35, 47. *Dickerson v. Rogers*, 4 Humph. 179. 5 Blackf. 323. *Townson v. The Havre de Grace Bank*, 6 Har. & Johnson 47.

The charge of the court, in relation to the delivery of the money to Dr. Swift, was correct.

1. There was no evidence from which the jury could infer a consideration, for the agreement to take the money to Swift. If anything more than a direction as to the mode of keeping the money, it was but a gratuitous undertaking.

2. As such the non-delivery to Swift was but a nonfeasance for which no action would lie.

3. No consideration for this undertaking lay in the delivery and acceptance of the money, for it was delivered and accepted for another purpose. 1 Parson's Cont. 581.

4. There was no evidence, that Swift was ready and willing to receive and keep the money; his present supposition as to what he would have done *if &c.*, does not tend to prove that averment.

Again—If taking the money from under the stove and placing it directly under the bed, would not be a conversion, it is difficult to see how taking it from under the stove, carrying it across the street, and then putting it under the bed, would be any more a conversion. 5. This bag of gold tied up being a specific thing, a count for money had and received cannot be sustained, without proof of an actual appropriation of it as money. *Danforth v. Grant*, 14 Vt. 283.

As to the exclusion of the evidence—

1. The mode of proof was improper, the intent is rather an inference from facts proved, than a question of actual mental action.

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When the witness says, "I should have returned," &c., he is but expressing his present opinion, that his circumstances and intentions were then such, as to have led to his return. This is not fact, but opinion.

2. The intent was an undeclared intent, it was not an intent to return to defendant's house as a guest. The plaintiff had no inn there to return to, the defendant could not have received him as a guest without violating the law. *Non constat*, that the defendant would have received him; for he was bound by no obligation to the plaintiff to continue in violation of the law. 2 Kent's Com. 1st Ed. 462.

The opinion of the court was delivered by

REDFIELD, CH. J. The first question arising in this case is in regard to the plaintiff being a guest of defendant, at the time he deposited the \$4,000 in gold with him to keep. The plaintiff's testimony tended to show he came to Bennington, on business, on the 26th of February, and put his horse into defendant's stable, he being a common innkeeper, leaving his wagon, harness, and buffalo skins in defendant's custody, where they remained without interruption till the 6th of March, the money being lost on the night of the 5th of March. The plaintiff took a room, became a guest in the strictest sense, and continued to lodge and board constantly at defendant's inn till Saturday the 1st day of March, after breakfast, when he went to his brother's in the vicinity, and remained over Sunday. On Monday he returned to the inn, and dined there, occupying the same room as before. Monday night he took tea, lodged with his brother, and took breakfast the next morning. The plaintiff then returned to defendant's inn, occupying the same room continuously, night and day, till Wednesday evening, about half past five o'clock. In the course of the day, Wednesday, he received the \$4,000 in gold, being 200 double eagles, and delivered them to the defendant, in a shot-bag, in plaintiff's room. Defendant said, at the time of receiving the money, he did not like to be accountable for so much money. Thereupon plaintiff took it, wrapped it in a newspaper and handed it back to defendant, saying, there was no danger, and requesting him at the time to put it in the tick of the straw bed in which he, defendant slept, and there to keep it through the night, and not to let any

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one know it, plaintiff saying he was going to his brother's, and should not be back until the next morning, when he did, in fact, return, and remained in defendant's inn through the day, taking dinner and tea. Nothing was said about plaintiff giving up the room, which the plaintiff continued to occupy every day, more or less, during the whole time, except Sunday, and had fires built by defendant. Just before plaintiff left defendant's inn, on the evening of the 5th of March, and after he had delivered the money to defendant, and told him to keep it, he called defendant, and told him his house was more exposed to fire than that of Dr. Swift's which was near. "He wished him to take the money over to Dr. Swift, and let him keep it through the night," which defendant promised to do "right away," or "presently." The money was not then in the immediate view of the parties, but in an adjoining room, some ten feet distant, where defendant had placed it. About nine o'clock in the evening, defendant took the money to Dr. Swift's house, but seeing no signs of the Doctor being up, or at home, and supposing he might have been called away, carried the money back to his own house. There was no evidence tending to show that defendant or plaintiff expected anything was to be paid for keeping the money, or carrying it to Dr. S. The defendant's testimony tended to show that plaintiff stayed less at defendant's house than above stated, and that on Sunday, he wrote defendant to bring his clothes and papers at the room, the next morning, to plaintiff's brother, which defendant did accordingly. The defendant notified the plaintiff, early on the morning of the 6th, of the loss of the money, and that it had been stolen, and gave evidence, tending to show that it was lost by a burglarious entry of the house from without, but what such evidence was, is not stated. There were a number of boarders and lodgers in the defendant's house at the time. Nothing is stated in the case, to show that any one in particular knew the time or the manner of the money being taken, or that any one heard any disturbance about the house during the night, or that any marks of violence were found upon the house. This is a brief statement of the leading facts; others will appear more fully in the course of the opinion.

I. In regard to the question, how far the plaintiff can be regarded as a guest of defendant, at the time the money was put into the defendant's hands, and up to the time of the loss, the cases are not

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very clear. The case of *York v. Grindstone*, 1 Salkeld. 388, has been understood by most of the elementary writers, as deciding, by a divided court, that one by leaving his horse at an inn becomes a guest. And such is virtually this decision, inasmuch as defendant's lien as innkeeper is recognized, in regard to a horse left at his stable by a traveler who did not himself put up at the inn. And such lien does not exist as to horses put at the stable of an innkeeper, even by those who are not travelers and guests. And so this case is perhaps justly regarded, by judges and elementary writers, as settling the point that one becomes a guest, as to all the property which the innkeeper consents to take into his keeping, by leaving his horse, from which profit is derived, although the same relation is not created by leaving a dead thing, as a trunk from which no profit arises, as is intimated, although not decided, in *Gelley v. Clark*, Cro. Jac. 188. But that point has since been regarded as settled by this case, although the case was adjourned for advisement, "being a new case." In 1 Smith's Lead. Cases 50, in the note of that learned and accurate writer to Calye's case, (8 Coke's Rep. 32,) it is said: "If a traveler leaves his horse at an inn, and lodge elsewhere, he is, for the purpose of this rule, to be deemed a guest." And 3 Bac. Ab. Tit. Inns and Innkeepers, c. 5, p. 666, takes the same view of the law, referring to this and other cases. And Mr. Chitty, in his treatise upon contracts, p. 476, says: "A person may be a guest, though he merely leave a horse at the inn, and himself lodge elsewhere." And I cannot find that the doctrine of this case of *York v. Grindstone*, to the extent above laid down, has ever been questioned in England. It is equally well settled, too, that one becomes a guest by going to an inn for mere temporary refreshment, either food or drink. (*Bennet v. Mellor*, 5 T. R. 273.) This last case is certainly going the full length of the most temporary stay, and must still be regarded as altogether sound. So too, the length of time one remains at the inn is not important, if he remain there in the transitory character of a guest. (3 Bac. Ab. *ubi supra*, Chit. on contracts 476, and notes.) It is unquestionable that an innkeeper may receive goods as a common bailee, to keep with or without reward, and thus stipulate to be excused from the increased responsibility of an innkeeper, or he may consent to assume this increased responsibility toward one who is not strictly a guest, for things deposited with him.

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(*Williams v. Green*, 3 Eng. Com. Law Rep. 353.) In other words he may increase or restrict his general responsibility by special contract, as is held in regard to common carriers. (*Farmers' and M. Bank v. Ch. Transportation Co.*, 23 Vt. 186.) But a mere notice to guests, that the innkeeper will not hold himself responsible for goods, unless expressly assented to by guests, will probably not have this effect, except, perhaps under special circumstances, as in regard to being notified of extraordinary amounts of money, and other valuable goods, so that they may be kept with proportionate care, as is held in regard to carriers, in the last case, and for similar reasons. The same rule in regard to what is necessary to create the relation of guest, has been adopted in some well considered cases in this country: *Mason v. Thompson*, 9 Pick. 280, where it is held that an innkeeper becomes liable for the safe keeping and return of a chaise and harness, left in his custody by a traveler who put his horse at the inn, and himself put up with a friend. And to the extent of the horse and equipage certainly, we think, it must be regarded as fully settled by authority, both in England and this country, that the innkeeper is liable as such where the horse of a traveler is put at the inn, although the owner or traveler himself puts up at another place. (*Peet v. McGraw*, 25 Wendell 653.) And the cases of *Grinnell v. Cook*, 8 Hill 486; *Thickstun v. Howard*, 8 Black. 585; *Hickman v. Thomas*, 16 Alabama 666, which are often referred to as denying that the relation of guest is thereby created, so as to impose the increased responsibility of innkeeper, certainly do not decide that point, since it was not involved in the cases, although such an opinion is there intimated. All that is there decided is, that the horse of one, not a traveler, put at an inn, created only the ordinary liability of a bailee, for compensation, on the part of the innkeeper. And this is altogether consistent with the cases of *Mason v. Thompson*, and *York v. Grindstone*.

It is observable that no case has yet arisen where a traveler, putting his horse at an inn, has left other goods than such as pertain to the horse and carriage. But upon principle, if the relation of guest is thereby created, and the host consents to take other portions of the traveler's necessary luggage, like his overcoat, which it is most common to leave with the horse, but usually within the inn, or even one's trunk or money, if put into the custody of the

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proper servant or agent, at the bar, while the innkeeper retains the horse, from which he derives profit, it is difficult to see why he should not be held liable to the full extent, as innkeeper, for all that he thus accepts. And many judges thus lay down the rule, which seems but a fair corollary from the cases. But as no case has gone that length, and this case does not now seem to involve that naked point, we do not intend here to decide it.

— This case, on the evidence put in by the plaintiff, seems to present, in the first instance, the relation of guest, in the strictest sense. And we do not think it necessary to continue that relation, that the plaintiff should have continued his dwelling, for the time even, within the inn. The relation of guest was clearly created by putting the horse at the inn, and it was undeniably extended to all the plaintiff's goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time. This matter seems to be perfectly settled by the custom in the cities. It is there considered that taking a room is the decisive act to create the relation. That being done, the guest is charged, as such, for his meals and lodging, whether he take them at the inn or with his friends, as any one may know who has had experience in such matters. And this seems to us well enough. One in so extensive a city as New York, might find it convenient to have a room for his parcels, and to take his dinner at a down-town hotel, while he might choose to have his lodging, and most of his personal apparel and baggage at an up-town house. And it would certainly be unreasonable, if one chose to be at this expense that he should not have the same security for his goods left at the one hotel as the other. Or if one took lodgings at a hotel, and should subsequently find it more comfortable to lodge with a friend, and for any reason should not choose at once to give up his room, and break up his connection with the hotel, it would certainly sound very strange that he should not have the same security for his goods as if he made the hotel his constant abiding-place for the time. He would certainly be bound, ordinarily, to pay till he gave up his room, and in all the books, pay, or the right to charge, is made the criterion of the innkeeper's liability. But after one has given up his room, and closed his connection with the hotel, then, indeed, it is generally understood, and no doubt correctly, that for any baggage left at the inn the landlord is only liable as

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a common bailee. And it was toward this point that the defendant's testimony was addressed, and which, if made out, would probably have been sufficient to excuse the defendant as to his increased responsibility for the personal goods of the plaintiff; certainly unless this responsibility can be predicated merely of the horse remaining at the inn, which has not yet been regarded as settled. This is not the view taken of the law upon this point by the court below, and in that there was error.

In the view we here take of the case, the testimony of the plaintiff to his purpose of returning to defendant's house on the morning of the 6th was important, and should have been received. The parties being made witnesses, as the law now stands, are witnesses to every point material to the determination of the case. And the plaintiff saying to defendant, when he left the evening before, he should not return till morning, was equivalent to saying he should then return, and his *bona fide* purpose of then returning seems to be very significant upon the point of the continuance of the relation of guest, so far as it depended upon the intention and expectation of the plaintiff.

but not
as guest

II. In regard to the general liability of an innkeeper, it is surprising that the law should still be so indeterminate. But the cases are fewer and less decisive upon this important subject than might have been expected. Even the absurd dictum in *Newton v. Trigg*, 1 Shower's 269, where Eyres, J., says, "*They (innkeepers) may detain the person of the guest who eats,*" has been constantly quoted to establish the existence of such a right in the landlord, and without much examination, (although the point decided in the case is, whether an innkeeper may become a bankrupt,) until the comparatively recent case of *Suntolf v. Alford*, 8 M. & W. 247, where Lord Abinger says, "I would be sorry to have it thought I entertain any doubt in this case, or required any authority to support the judgment I propose to give,"—that no such right to detain the person of the guest can be for a moment tolerated in a free country. So, too, we find numerous creditable judges, and some decisions, carrying the liability of an innkeeper to the full extent of a common carrier, and thus making him an insurer against all losses not caused by the act of God or the public enemy. But such is clearly not the general course of the decisions in Westminster Hall, and that extreme responsibility was

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expressly repudiated by this court. (*Merritt v. Olaghorn*, 23 Vt. 177.)

It is there held that an innkeeper is not liable for loss of goods of the guest by fire from without, the probable act of an incendiary, and without any fault or negligence on his part, or on the part of any inmate of the house. But we have never intimated that we were prepared to put the liability of an innkeeper upon the same ground as that of other bailees. On the contrary, we regard it as well settled that the liability of an innkeeper is more severe than that of any other bailee, with the single exception of common carriers. In *Richmond v. Smith*, 8 B. & C. 9, (15 Eng. Com. Law R. 144,) Lord Tenterden, says, in regard to goods stolen from the custody of an innkeeper, "The situation of an innkeeper is precisely analogous to that of a carrier." This may be too strongly expressed, if applied to all cases of goods taken from the custody of an innkeeper. For it may be done by superior force, and without his fault, and still not the force of a public enemy, which is necessary to be shown to excuse a carrier. But in regard to goods stolen from the custody of an innkeeper, and no evidence to show how it was done, or by whom, the liability is the same as that of the carrier. The innkeeper is bound to keep his house safe from the intrusion of thieves, day and night, and if they are allowed to gain access to the house, and especially without the use of such force as will show its marks upon the house, it is fairly presumable that it was either by the negligence or connivance of the host, and such is the judgment of the law thereon.

Perhaps the rule of law as applicable to such a case is better expressed by Mr. Justice BAILEY, in this same cause: "It appears to me that an innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God, or the king's enemies." And Mr. Justice STORY, lays down the rule in regard to this liability as correctly as it can well be stated, in his work on Bailments, § 472: "But innkeepers are not responsible to the same extent as common carriers. The loss of goods while at an inn will be presumptive evidence of negligence on the part of the innkeeper or his domestics. But he may, if he can, repel the presumption, and show that there has been no negligence whatever, or that the loss has been occasioned

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by inevitable casualty or superior force." And in the case of *Dawson v. Chamney*, 5 Ad. & Ellis, N. S. 164, (48 Eng. Com. Law R. 164,) Queen's Bench, 1843, Lord DENMAN, in giving judgment, quotes these words of Mr. J. STORY with approbation, and substantially bases the judgment of the court upon them. Pothier's exposition of the civil law liability of this class of bailees is much the same. The Institutes of Justinian, lib. iv., tit. 6 § 3, thus lay down the rule: "*Item exercitor navis, aut cauponæ, aut stabuli, de damno, aut furto, quod in navi, in caupona aut stabulo, factum erit, quasi maleficio teneri videtur.*" The innkeeper, it seems, was thus made liable for all damage or theft, the same as if it arose from his positive wrong. If it happened, it was in law regarded as his wrong, *quasi ex maleficio teneri videtur.* And the perpetual edict of the praetor, which has formed the basis of the commentaries of most of the civil law writers upon this subject, is little more than an amplification of the text of the Institutes. The code Napoleon, book iii., tit. 2 § 5, 1958, is scarcely more than a translation of the Institutes: "They (innkeepers) are responsible for the stealing or damage of the property of the traveler, whether the robbery were committed or the damage were caused by the domestics and officers of the establishment or by strangers going and coming within the inn: 1954, *ib.*: "They are not responsible for robberies committed with armed force, or any other superior force." These two maxims seem to embody the substance of our law upon the subject at the present time; in confirmation of which we would further refer to the following English and American cases: *Clute v. Wiggins*, 14 Johns. 475. In this case, a wagon loaded with bags of grain was put in a wagon house, which was broken open; "from which," say the court, "it is to be inferred that the building was close, and the doors fastened in such a manner as to promise security." Still the defendant was held liable. The innkeeper is liable for goods stolen from any part of his house, unless he expressly limit his responsibility, and this is assented to by the guest. (*Richmond v. Smith, supra.*) He is responsible for money belonging to his guests. (*Kent v. Suchard*, 2 Barn. & Ad. 303—22 E. C. L. R. 186.) And he is responsible for the acts of every one within his house, unless introduced by the guest, as all the cases agree. (*Towson v. The Havre de Grace Bank*, 6 Har. & Johnson 47.)

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It may be important to consider how far the defendant is here liable for a burglarious entry of his house from without, which the case says he claimed, and gave testimony tending to prove. The detail of the evidence not being given, it is impossible to determine whether the burglary was of a character, if proved, which should exonerate the defendant; for, although the authorities are not decisive, or altogether coincident upon this subject, it must be obvious to all that an ordinary burglary, such as might have been expected to happen, upon proper temptation, should have been provided against by the host, and the omission to do so is itself negligence. And the recent decisions seem rather to incline to the view that the host is liable for all losses of the goods of his guest, even by burglary or robbery, unless produced absolutely by superior force, the *vis major* of the schools. Ch. Kent, in Com. 2 vol., page 759, (598,) in William Kent's ed., seems to incline to this view as the fair result of *Mason v. Thompson* and *Richmond v. Smith*. Mr. Jus. STORY, in the later edition of his *Bailments*, seems to incline to the same view, page 309, 2d ed. And ordinarily an intrusion into a house by robbers from without, or burglars, must be attended with force and fracture, and more or less noise and alarm, no doubt; and in this peaceful portion of the country to have happened, and leave no vestige, would be fairly calculated to excite suspicion against the host, of negligence at least. And where marks of the intrusion are found, so as to leave no doubt of the mode of the loss, it must still be a question how far the house was properly fastened. And following the general rule of diligence, on the part of innkeepers, of "uncommon care," as laid down by Lord HOLT, or, as some of the books have it, "the extremest care," it would certainly be incumbent upon them so to fasten the inn itself, where their guests lodge, that it would not be liable to be broken by common force or art. But I can comprehend that money might be lost by a burglarious entry, under peculiar circumstances, without affording any just ground of imputing even negligence to the innkeeper; and in such a case notwithstanding some dicta to the contrary, I should myself incline to the opinion that the innkeeper is not upon principle, holden.

But I do not think a jury could be allowed to exonerate an innkeeper from the loss of the goods of his guest upon presumption merely, or indeed without proof of some of the circumstances or-

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dinarily attending the breaking of a house securely fastened. It is the distinctive peculiarity of this species of bailment that the host is *prima facie* holden for the restitution of the goods of his guests. And to make this rule of any practical utility, it is indispensable to hold the host to proof of the mode in which the goods were taken from him, and that it was without any fault or negligence on his part.

And if his house is properly secured, and the goods properly guarded, as such an amount of money would be likely to be by the owner, it is fairly supposable that some trace of its departure may ordinarily be found. And when a case occurs that possibly or probably professional robbers may have succeeded in eloining money or other goods without leaving foot-prints, it is better that the innkeeper should be held liable until he can prove the mode of the loss, than that so beneficial a rule of law, and one so indispensable to the quiet and comfort of travelers, should be virtually demolished.

And with every disposition to take a reasonably favorable view of the case for the defendant, it seems to us that if he really held the money, as innkeeper at the time, he should have shown something more definite as to the mode of the loss than any thing detailed in the bill of exceptions, to excuse himself from restoring it. On the bill of exceptions, it seems to be the common case of goods left at an inn and lost by theft of some unknown person, which is the common case of such loss. The manner of the loss should be stated, if known, in order to raise the proper question of law, as it regards this portion of the case, the law reversing its ordinary presumption of innocence in this case, and presuming the liability in the first instance; for if the fact of loss may be left to a jury, together with the ordinary negative evidence which may be supposed to attend such a case, as a sufficient ground upon which to excuse the innkeeper, the practical benefit of the rule of his presumptive liability is at once abandoned. A presumption which may be encountered and overcome by a counter presumption, without proof, is of no avail in its practical application to the business of life. It thus becomes neither an *absolute* or *probable* presumption, but a mere conjecture, good enough till some counter conjecture springs up, which is not what is meant, in law, by a "presumptive liability." It may more properly be likened to the

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presumptive bar of a debt, from lapse of time, or the legal bar of the statute of limitations, both of which are removed by a new promise, or the payment of interest, or part of the debt; but it cannot be left to a jury to raise such opposite evidence by mere conjecture or counter presumption. So, too, in the case of an innkeeper; the mere fact of the loss of the goods, without any connivance or consent on his part, and in the common course of his business, with his doors fastened in the ordinary mode, is no sufficient ground from which to allow a jury to find no negligence on his part; for the law has attached an opposite, and to some extent an artificial presumption to these same facts; i. e., a presumption of negligence. And although this is not an absolute and conclusive presumption, like some in the law, it is nevertheless one of those presumptions which, to be of any avail practically, must be allowed to stand till encountered by some tangible and reasonable proof to the contrary, either positive or circumstantial. Le BLANC, J., says, in *Burges v. Clement*, 4 M. & S. 306, "Negligence will be imputed to him (the innkeeper) where the loss is not to be ascribed to any other *known* cause." This seems to us the true rule; and when some other cause is known and presented, it may then become a question whether it is sufficient in law. But to say that it was "from a burglarious entry from without," and that proof was given tending to show that, is not sufficient, inasmuch as the majority of such burglaries may be supposed fairly to result from negligence on the part of the innkeeper, or his servants, or the inmates of the house; and in such case the innkeeper is liable.

III. In regard to the agreement to deliver the money to Dr. Swift, it may be viewed in two lights: 1st. Was the promise upon sufficient consideration? Of this we entertain no doubt. The delivery and acceptance of the goods are a sufficient consideration for any undertaking in regard to them, even where the service is merely gratuitous, as was held in *Coggs v. Barnard*, Ld. Raymond, 909, Com. 148, Salk. 26, and which has not been questioned since; and the goods being, at the time of the undertaking, in the power of the parties, is the same thing, since it is presumable that but for the promise the guest would have reclaimed his goods; he was therefore, by the new promise, induced to forego an advantage, which is a sufficient consideration. 2nd. Was this promise reasonably performed? Did the defendant do all he ought reasonably

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to have been expected to do in its performance? If so, he afterward merely retained the goods as a depositary, without pay, and would, as the court below charged, be liable only for gross neglect. It ought, perhaps, in such a case, to be brought to the mind of a jury the question of neglect or diligence is very much affected by the quality of the business. A man is expected to use care and diligence proportioned to the importance and difficulty of the business intrusted to him; and from the great value of so large a sum of money, the ferocity of men's appetites for money, and the consequent certainty of it being stolen, if exposed, one who should take the same care of such a bag of gold, which he might fairly be expected to, of other goods, might still be guilty of gross neglect as to this, and not as to other things kept with the same diligence. If the defendant failed reasonably to perform his contract in this respect, he ought probably to be held liable for the consequent loss to the plaintiff.

IV. If the defendant held the money, as innkeeper, and made this contract upon sufficient consideration to deliver to Dr. Swift, the inquiry will arise, what effect this contract will have upon his former obligation. That will depend upon the probable intent of the parties, which may ordinarily be gathered from the terms of the contract and attending circumstances. If the new contract was intended to supersede the former one, and come in its place, so as to have the defendant hold the money at once, in a new relation, then, of course, the former one will cease. As, for instance, if the plaintiff had consented to have defendant loan the money to some one, or had employed him to carry the money to Troy, or to New York, and he had entered upon this duty in either case, and had lost the money upon the road, or before it was actually loaned, or if in any other way the new contract was inconsistent with the continuance of the former one, the old contract is released by entering into the new, although of the same grade, and not creating a technical merger.

But when the new contract is consistent with the continuance of the former one, and only provides a new mode of *discharging* the former one, it produces no effect upon it unless or until performed; and this latter seems to have been the probable purpose of the parties in this case. It is hardly supposable that if defendant held the money, as innkeeper, the parties could have expected his

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duty, as such to be affected until he performed the new contract, or, at least, entered upon its performance. And after the failure to perform by accident and without fault, it would be reasonable, perhaps, to conclude the parties expected the defendant's obligation would remain the same it was at the time this new contract was entered into, unless there was something to show that the defendant declined keeping the money, as innkeeper, which he might do if he preferred to risk the consequences of such refusal, rather than to assume the responsibility; and this new contract was entered into to induce the defendant to consent to keep the money for that purpose; i. e., the purpose of the new contract. In that case it would seem reasonable if the defendant failed to perform the new contract, without his fault that the money would remain in his hands, only in the capacity of an ordinary bailee at most. But as new facts in a future trial may be evolved, we have not examined the cases at length upon this subject, especially as they have not been brought to our notice by counsel, but they will be found to sustain the general views above stated. Chitty on contracts, 111, 113, and notes and cases referred to.

Judgment reversed, and case remanded.

NOTE.—A more extended examination of the cases upon this subject, especially the American cases, develops nothing at variance, so far as the general course of decision is concerned, with the leading views put forth in the opinion in this case. And in some points where, at the time of writing the opinion, I was not aware of any express authority, I find almost precise coincidence and confirmation. The case of *Wintermute v. Clark*, (5 Sandford's Superior Court R. N. Y. city, 242,) seems a rather remarkable confirmation of our views upon the question of what is requisite to determine the relation of guest and host. OAKLEY, Ch. J., says, "It is plain that the liability of an innkeeper continues no longer than the continuance of the relation between him and the guest. That relation ceases *when the guest pays his bill, and leaves the house, with the declared intention of NOT RETURNING.* In this case the guest had carried his trunk to an inn, and taken a room, putting his trunk below, in some place pointed out by the servant as a safe and suitable place, and then had gone out to lodge with a friend. He returned in the morning and paid for the room, though somewhat objecting, and left the hotel. His trunk was never taken from the hotel by the guest. The testimony was conflicting whether it was lost before the guest settled his bill, or afterward, and Judge OAKLEY's remarks had reference to this point chiefly. This case had not come to my notice at the time of writing the opinion.

In a considerable number of the states, the courts have shown a disposition to put the liability of innkeepers upon the same high ground as that of common carriers. In Massachusetts the case of *Mason v. Thompson*, and some others per-

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haps, contain such intimations, and therein are doubtless at variance with the English decisions. But that the case of *Mason v. Thompson*, upon the main ground is not sound, I entertain no question, notwithstanding the sharp criticism of BRONSON, J., in *Grinnell v. Cook*, (8 Hill 486.) This last case is merely that of a townsman putting a horse or horses, at livery at an inn. And *Thickston v. Howard*, (8 Blackford 535,) is the of same character. And *Hickman v. Thomas*, (16 Alabama 666,) is the case of a stage proprietor putting his horses at an inn on his route, and the court held, and correctly, no doubt, that the innkeeper had no lien upon the horses for their keep. These cases, with that of *Peet v. McGaw*, (25 Wendell 658,) which finally turned upon a question of pleading, are sometimes referred to as having shaken the case of *Mason v. Thompson*. But in the case of *Peet v. McGaw*, CH. J. NELSON cites the case of *Mason v. Thompson*, as to the main question determined, with approbation. And although in some of the other cases, it seems to be questioned whether, if a *traveler* merely put his horse at an inn, and go somewhere else himself, the proper relation of guest is thereby created. Yet this question is in no sense involved in any of these cases; the plaintiffs in all the cases being *inhabitants*, and not *travelers*, could not become guests even if they resided personally at the inn, but would become *boarders*, and their horses, while they remained there, would be at livery merely. And upon the main point, whether, if a *traveler* leave his horse at an inn, and does not himself lodge at the inn, the innkeeper is liable as such, and for his keep holds a lien upon the animal, the decisions are all one way. It is not even a questionable point, in my judgment. We have nothing to oppose to that view but the dissent of Lord HOLT, in *York v. Grindstone*, the principle of the decision of the majority of the court being firmly established in the English law ever since that date. That some of the dicta of WILDE, J., in the case of *Mason v. Thompson*, upon the general subject of the extent of an innkeeper's liability, require qualification, few thorough lawyers at the present day would be inclined to question. But similar dogmas are found in many of the English cases, from different eminent judges, and in a very large proportion of the American cases of that date, and immediately subsequent. And although it is some years since I have gone thoroughly into the subject of the old English law, in regard to the comparative responsibility of innkeepers and carriers, for goods intrusted to them, it is certain there was an exact correspondence in the liability of these two classes of bailees, in the civil law, and I am convinced by the form of the early writs against such bailees in the *Registrum Brevium*, that the primitive liability was precisely the same in England. But it is the responsibility of the innkeeper which has stood its ground, while that of common carriers has been constantly growing more and more stringent. But it is not needful to say more. The difference in the extent of responsibility in these two classes of bailees is now firmly established, and these dicta of judges and elementary writers, declaring them identical, must be regarded as *apocryphal*, or at least behind the times. And this is all which can be fairly objected perhaps, to *Mason v. Thompson*.

The right of a guest to maintain his relation to an inn, notwithstanding temporary absence, is very clearly recognized in *Grinnell v. Cook*, by BRONSON, J. "If a traveler leave his horse at an inn, and then go out to dine or lodge with a friend, or if he leave the inn and go to another town, intending to be absent two or three days, the rights and liabilities of the parties remain the same as if the traveler had not left the inn." In *Thickston v. Howard*, SMITH, J., speaking of the comparative responsibility of carriers and innkeepers, says: "The rule of law is near-

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ly or quite as rigid in the one case as the other, although there may be some difference in the cases excepted from its operation." In *Hill v. Owen*, (5 Blackford 823,) DEWEY, J., says: "That the loss of the goods of the guest from a common tavern, is *prima facie* evidence of negligence on the part of the keeper, and, unexplained, sufficient to render him liable." The case of *Towson v. The Havre de Grace Bank*, (Har. & Johns. 47,) puts the liability of the innkeeper on the ground of the agent of the bank being a guest, and paying, and though the bank paid nothing, and were not, in any sense, affected by the expenses of the agent, he acting only in the single transaction and that gratuitously, BUCHANAN, J., says: "Innkeepers are answerable by reason of the profits arising either from the keeping of the horses, etc., of their guests, or the keeping of the guests themselves, in the case of money, or other property, from the keeping of which no profit can arise." P. 52. In the case of *McDonald v. Egerton*, (5 Barb. Sup. Ct. 560,) the general views above are affirmed. MASON, J., in the language of the reporter's note, holds: "If a person, after becoming a guest at an inn, goes away for a brief period, leaving his property, intending still to return, he is to be considered as still continuing to be a guest, and, and if his property is lost during his absence the innkeeper is liable."

In the case of *Shaw v. Berry*, (31 Maine 478,) the rule laid down seems certainly more stringent than the cases will justify. TENNEY, J., says: "He (the host) is bound to keep the goods and chattels, so that they shall be actually safe, inevitable accidents, the acts of public enemies, the owners of the goods and their servants excepted. Proof that there is no negligence in the innkeeper or his servants, is not sufficient for his immunity." If this were to be understood in its most extensive signification, it certainly conflicts with the view taken by this court in *Merritt v. Claghorn*, (28 Vt. 177.) But the case of *Shaw v. Berry*, required no such extreme view. It was that of a traveler's horse breaking a leg in defendant's stable during the night, in a manner unknown to any one. In principle, the case was much the same with the present, and seems to have been tried, in the first instance, much as was this case, with a similar result. And there can be no doubt of the tavernkeeper's liability in such a case. And he could not ask a jury to exonerate him, upon the presumption of faithfulness, until he could show by evidence, either positive or circumstantial, how the injury did accrue, that the court and jury might determine whether it arose from any defect in the stable, or neglect of the innkeeper or his servants. Until that is made to appear, the law presumes, that it was the fault of the host, either mediately or immediately.

The case of *Berkshire Woolen Co. v. Proctor*, (7 Cushing 417,) seems to be an elaborate and satisfactory exposition of the law, but it does not come directly within the range of the present discussion. It is said in *Jones v. Thurlow*, (8 Mod. 172,) that the innkeeper has a lien upon the horse of his guest "for the meat of the horse, but not for the meat of the guest." But this distinction seems not to have been preserved in the later cases. It seems now to be considered that this lien extends to all the goods put into the keeping of the host, or forming the proper luggage of the traveler and his family, and the equipage and accompaniments of the horse and carriage. The lien and the liability seem to be co-extensive. (*Thompson v. Lacy*, 3 B. & Ald. 288: *Proctor v. Nicholson*, 7 Car. & P. 67.) It has recently been decided by the English courts (Law & Eq., *Armistead v. Wilde*, 17 Queen's Bench R. 261,) that if a guest is grossly negligent in exposing money, whereby it is stolen, he cannot recover for it. We have thus examined, in detail, almost every case bearing upon the points involved in the present one.

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JOHN S. DALRYMPLE v. TOWN OF WHITINGHAM.

Selectmen, their Powers. Arbitrators. Award. Town Orders.

What matters are proper to be considered, in assessing damages occasioned by laying a highway.

The power and duties of selectmen are given and limited by statute, and when they cannot agree, with the person interested in lands taken for a highway, upon the damages, they may submit the same to arbitrators; but they can only submit those matters proper to be considered in ascertaining the damages sustained by taking the land for which they, as selectmen, are authorized to make compensation; and the arbitrators in ascertaining the damages, are confined to such facts and matters, as could be taken into consideration by the selectmen.

And in ascertaining the damages for land so taken for a highway, the only matters proper to be considered, are "the value of the land taken, the expense of fencing against the road, and the damage done to the land remaining."

And where the arbitrators in ascertaining the damages, took into consideration the injury sustained by the plaintiff by the discontinuance of the old highway, and the expense of building a cross road on plaintiff's land, it was held, that these matters were not within the submission, as the selectmen, under the statute, could not have made compensation for either of those matters, and, therefore, could not legally submit them to arbitration.

And where the selectmen of a town and the plaintiff, by express agreement, submitted all the matters passed upon by the arbitrators, but the submission as to some of the matters was not binding on the town, and the arbitrators verbally published their award, which consisted of distinct findings on distinct matters, having no connection—*Held*—that it is competent for the plaintiff to declare in assumpsit for the aggregate amount of the award, and that those matters improperly allowed and which can thus be definitely ascertained and computed, may be disallowed, and a recovery had by the plaintiff for the balance, or upon that part of the award which was good and legal.

And where the arbitrators made up their award of distinct sums, awarded on distinct matters, having no connection with each other, and so verbally publish their award to the parties; the statement of the aggregate amount of the award by the arbitrators will not render the award entire and indivisible; nor will such an effect be produced, if after so publishing the award, they give to one of the parties, at their request, a written statement of the amount of the award, intended for the use of the party, and not as a publication of the award.

A town order in these words, "The treasurer of the town of Whitingham is directed to pay to W. H. Follett or bearer, ten dollars and eighty-six cents on demand, Jan. 7, 1851," has all the elements of negotiable paper, and when such orders are drawn, presented for payment, and payment refused, they are negotiable, and can be prosecuted in the name of the indorsee.

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When a town order is delivered and accepted by a party, it operates as a satisfaction of the amount for which it is given, and the remedy of the party is only upon the order, and no recovery can be had upon that, until after the order has been presented to the treasurer of the town for payment.

ASSUMPSIT in which the plaintiff declared specially on a submission to and award of arbitrators. The declaration also contained the common counts.

Plea, the general issue, and trial by jury.

On the trial it appeared that the selectmen of the town of Whitingham, on the 16th day of July, A. D. 1850, duly laid out and surveyed a public highway in said town, across lands owned by the plaintiff jointly with James S. Dalrymple, and other lands owned by the plaintiff with one James S. Dalrymple, Jun., which survey was duly recorded in the town clerk's office in said town, on said 16th day of July.

That the making of said highway across said lands, was soon after commenced by said town, and the work of construction was prosecuted by said town during the summer and fall of said year.

That the plaintiff, (who was duly authorized by his co-tenants to act for them in the premises,) and the selectmen of said Whitingham, being unable to agree upon the amount of damages sustained by said parties, by reason of the laying out of said highway, across the said lands, agreed to submit, and did, on or about the 15th day of September, A. D. 1850, submit said matter to the arbitrament and final award of John A. Winslow and Noah Wells—and that at the time said submission was made, the said selectmen were informed by the plaintiff, that he was authorized by his co-tenants to act for them and in his own name in making said submission, and in conducting all the proceedings under or upon it, and the plaintiff, it appeared, had in fact such authority.

That the selectmen with this knowledge, and knowing the state of the titles to said land, made the said submission with the plaintiff, and it appeared that the selectmen appointed Freeman Worden, one of their number to appear at said hearing, and manage at the same, under said submission—that on the 24th day of October, 1850, the said parties appeared before the said arbitrators, and were heard in the premises.

That the plaintiff, at said hearing, claimed that the laying out and

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opening of the said new highway, would result in the discontinuance of part of the old highway, lying in Whitingham and Readsboro, contiguous to and running parallel with said new highway, both being on the same line of travel; and that said discontinuance would diminish the value of timber lands belonging to him and his co-tenants, lying contiguous to said old highway; and that said discontinuance would make it necessary for him and said James S. Dalrymple to build a cross road from their house in said Whitingham, and on said old highway, to the said new highway, a distance of about fifty rods across their joint lands in said Whitingham; and also further claimed the expense of building one fence on the line of said new highway, in said Whitingham, through lands owned jointly by him and his said co-tenants, as damages sustained by reason of the laying said highway through said lands.

That said arbitrators were duly informed of the state of the titles of said lands, and of the agreement that the business should be done in the name of said plaintiff.

That after a hearing in the premises, the said arbitrators, on the said 24th day of October, 1850, *made and verbally published their award to the plaintiff and said selectmen*; and therein awarded to the plaintiff as damages sustained by him and his co-tenants, by reason of the location of said new highway over their lands, the sum of \$198,75, damages and five dollars costs of reference.

And that as part of said publication the said arbitrators then and there stated *that forty dollars of said sum had been allowed by them, as damages for the discontinuance of the said old highway, in said Whitingham, and that fifty dollars of said sum had been allowed as damages for building said cross road, and that \$108,75, the residue of said \$198,75, was for the expense of building one fence on the said new highway across said lands, and that they had set off the value of the land taken for the new highway against the benefit which the plaintiff and his co-tenants would derive from the laying of the said new highway; and that the award was in fact made up in the manner and of the distinct sums so declared by the said arbitrators.*

That said selectman, while the hearing was in progress, told the said arbitrators, that the said old highway would be discontinued, and wanted the claim for damages therefor to be considered and

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passed upon by them; but insisted that no damages should be allowed therefor, but this was said without any other authority than that conferred by the submission and his appointment aforesaid. That after the decision had been made verbally, as aforesaid, the said selectman requested the said arbitrators to make and deliver to him a written statement of their said award.

Thereupon they delivered to him the following statement in writing, which was accepted by him as satisfactory.

"We the subscribers having been selected by H. Sawyer, F. Worden, and H. Corkins, selectmen of Whitingham, in behalf of said town in the one part, and J. S. Dalrymple of Readsboro', of the other part, for the purpose of estimating the damages caused by locating a certain road in said Whitingham, over the lands of said Dalrymple, having met the parties, and heard their allegations and arguments, do award and determine that said Dalrymple recover of the said town of Whitingham the sum of one hundred and ninety-eight dollars and seventy-five cents, in full of all damage to him in consequence of location, together with costs of reference, taxed at five dollars.

(Signed)

"NOAH WELLS

"JOHN A. WINSLOW.

"Readsboro', Oct. 24, 1850."

It also appeared that the said selectmen paid to the said arbitrators the five dollars, costs; and that said old highway has never been discontinued; and that demand was duly made of payment of the said award, before this action was commenced.

Under the common counts the plaintiff offered in evidence the three following town orders, viz:

1. "\$10.86. The Treasurer of the town of Whitingham is directed to pay to W. H. Follett or bearer ten dollars and eighty-six cents on demand.

(Signed)

H. SAWYER }
F. WORDEN } Selectmen.

Jan. 7, 1851."

2. "\$15.75. The town Treasurer is directed to pay W. H. Follett or bearer fifteen dollars and seventy-five cents, on demand.

(Signed)

H. SAWYER }
JOSIAH BRIGGS } Selectmen.

Whitingham, Feb. 28, 1852."

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3. " \$1,50. The town Treasurer is directed to pay, John S. Dalrymple one dollar and fifty cents on demand, for labor on the highway in August and September, 1850, by agreement of selectmen of last year.

(Signed)

H. SAWYER
S. D. FAULKNER } Selectmen.

Whitingham, March 18, 1851."

It appeared that the first of said three orders had at its date been duly presented to the treasurer of said town of Whitingham, and payment demanded thereon; and that the persons signing said orders severally as selectmen, were such at the time of signing; and that said orders were the property of the plaintiff at the time this suit was brought; and that neither the 2d or 3d order had ever been presented to the treasurer of said town for payment.

The County Court, December Term, 1853,—PIERPOINT, J., presiding,—instructed the jury that the plaintiff was not entitled to recover all or any part of said award—nor the sum mentioned in the first or second order—but that the plaintiff was entitled to recover under the count *for work and labor*, on the consideration of the third order, as it appeared said consideration was for work and labor performed by said plaintiff. It also appeared that said order was delivered and received by the plaintiff in payment for said labor.

The jury returned a verdict for plaintiff to recover \$1,50, the amount of the third order.

To the ruling and instructions of the court, as to the right of the plaintiff to recover on said submission and award, and to his right to recover under the common counts, the sums mentioned in the first and second orders, the plaintiff excepted.

And to the ruling and instructions of the court, as to said order for \$1,50, the defendants excepted.

O. L. Shafter and W. H. Follett for plaintiff.

The instructions to the jury were erroneous in these particulars.

I. There was error in the charge that the plaintiff on the facts found was not entitled to recover the whole amount awarded.

The arbitrators had equitable powers. 1 Swift's Dig. 468.—They could therefore give remote and contingent damages, as well

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as those proximate and certain. The \$40 and the \$50 are allowed in the award, not as independent claims, foreign to the laying of the road; but as damages sustained by "*reason of the laying of the said new road over the said lands.*"

Whether these remote damages would ultimately appear in the series of effects resulting from the laying of the road was a question of fact, upon which the finding of the arbitrators is conclusive, for that question was within the scope of the submission. *Emerson v. Udall*, 8 Vt. 357.

II. There was error in the instruction, that the plaintiff was not entitled to recover any part of the sum awarded.

The instructions should have been (assuming that the award was void as to the \$40 and the \$50,) that the plaintiff was entitled to recover the \$108,75, awarded for the fence on the new road. For that sum was not so connected with the other two that an allowance of it would effect the justice of the case. 1 Swift's Dig. 468-470. *Martin et al. v. Williams*, 18 Johns. 264. *Rixford v. Nye*, 20 Vt. 132. *Ut res majis valeat, quam pereat.*

III. There was error in the instruction that the plaintiff could not recover under the money counts, the amount of the first order, payment thereof having been duly demanded before the commencement of the suit. *Mattocks v. Lyman et al.*, 16 Vt. 113. *Perry v. Smith*, 22 Vt. 301. *Hay v. Hyde*, 1 D. Chip. 214. Comp. Stat. 118 § 46, 56. *Chase & Grew v. Burnham*, 13 Vt. 447. *Franklin v. Marsh*, 6 N. H. 364. *Kimball v. Huntington*, 10 Wend. 675. *Cummings v. Gassett*, 19 Vt. 308. Story on Promissory Notes § 12, 51, 489. *Learnard v. Walker*, Brayton 203.

D. Roberts for defendants.

I. The authority of the selectmen to submit to arbitration the question of damages, for laying out or altering highways, is given in Chapt. 22 § 19, Comp. Stat. Aside from this section they would probably have no such power. *Dix v. Dummerston*, 19 Vt. 262.

The only matters which the selectmen could lawfully submit, was the amount of damages for laying out of the highway; and this is all they did submit.

The statute gives no damages for the discontinuance of a highway. But this award was especially outrageous, in that it covered certain fanciful damages to occur from the mere problematical dis-

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continuance of the old road, whereby, when this should happen, if it should happen, certain wood lands of the plaintiff and his brethren, would lack a road to market, and their dwelling house would be left in the fields, occasioning a necessity for a new private road, as an outlet, across their own lands.

We need not inquire whether the award may not be good in part, for it is declared upon as an entire thing.

As an entire thing it is subject to two fatal objections:

1. It is without the submission.
2. It is against law.

II. As to the rejected town orders.

The selectmen may draw orders on the treasurer, not without limit, but for claims which they are authorized to audit and allow. Comp. Stat. Chapt. 15 § 48-49.

The act is an official one. The orders are warrants to the treasurer to pay the sum named in them, one town officer issuing the order to another.

When so drawn, presented and payment refused, an action lies *upon the orders*. § 56.

But here the declaration does not count upon the order; nor upon an *insimul computassent*.

To recover upon the money counts, it must appear either, 1st. that the original consideration was money, and not merged in the orders, 2d. the orders must of themselves be evidence, like a bill of exchange, or promissory note, of a money consideration.

As to the first ground—

It is to be observed, that no consideration is expressed in the orders—that none was proved—and whatever the original consideration was, that the plaintiff was an apparent stranger to it.

As to the second ground—

A town order is not much like a bill of exchange. It is not a written request from one person to another to pay money absolutely; but as here, a written direction from one town officer to another, to pay out of a particular fund; his authority to pay depending upon the sufficiency of the fund. It is not a promissory note for a like reason. No question of reasonable demand can arise, as in case of a bill; no notice of dishonor necessary.

A partner after dissolution, though with special authority to receive all debts, and discharge all claims of the partnership, cannot

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indorse a note to bind the firm, though given to the firm. 1 Parson's Cont. 44, note (q.)

So a mere power to audit and allow claims (Comp. Stat. Chapt. 15 § 49) does not authorize the selectmen to give promissory notes and bills of exchange, in the name of the town; more especially as the statute prescribes the kind of instrument, which the selectmen are authorized to draw.

As to the second order. It never having been presented, no action lies upon it. Treating it as a bill, no recovery could be had upon the original consideration, without proof of its dishonor. Chit. on Cont. 771.

III. *As to the order allowed—*

As it was received as payment, the original demand was necessarily extinguished, though the order had been blank paper. But being a legal instrument, upon which the plaintiff could have perfected a right of action by demand, he could not revive the original consideration, by his own neglect to present the order to the treasurer.

The opinion of the court was delivered by

ISHAM, J. The special count in this declaration is upon an award of arbitrators. We learn from the case, that on the 16th of July, 1850, the selectmen of Whitingham laid out a public highway, over land owned by the plaintiff, and James S. Dalrymple, and also over land owned by the plaintiff and James S. Dalrymple, Jun. It appears that the plaintiff was authorized by those jointly interested with him in the lands, to make the submission, and take the award in his own name, so that no objections from that matter arise in the case. The statute authorizes the selectmen to take the land of individuals for that purpose, on paying therefor a just and adequate compensation. The 19 sect. of Comp. Stat. 164, provides, that if the selectmen and the persons interested in the land so taken, are unable to agree upon the amount of compensation, or damages, they may refer the same, to be ascertained and determined by an award of arbitrators. The powers and duties of selectmen are given and limited by statute. They can submit to the consideration of arbitrators that matter only, which can properly be considered in ascertaining the damages sustained for taking the land, and for which they, as selectmen, are authorized to make

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compensation. The arbitrators are required to discharge, in this particular, the duty which was imposed upon the selectmen, and in ascertaining the amount of damages, they are confined to such facts and considerations only, as could be taken into consideration by the selectmen.

We see no objection to the submission; that is, the selectmen have submitted no matter to the arbitrators, but what, by the act, they were authorized to do. The selectmen being unable to agree, upon the amount of damages sustained by reason of laying out the road, they agreed to, and did submit the matter to arbitration. This power is directly conferred upon them by statute. The question is therefore resolved into the inquiry, whether the arbitrators, in ascertaining the amount of damages, took into consideration matters not submitted to them, and which the selectmen had no power to submit. In the case of *Commonwealth v. Norfolk*, 5 Mass. 435, it was held "that the value of the land taken, the expense of fencing against the road, and the damage done to the land remaining," were the only matters proper to be taken into consideration. This rule was recognized in *Livermore v. Jamaica*, 23 Vt. 868.

From the award of the arbitrators we perceive, that in reporting the sum of \$198,75 as damages sustained, and for which the town were to make compensation, they allowed the sum of \$40, for the discontinuance of the old road. For this matter, no damages should have been allowed; as the plaintiff was not under the statute entitled to compensation, either from the selectmen, or under the award of the arbitrators. It is only when land is taken for public use, that compensation is to be made; not where land reverts to the owner, by a discontinuance of a public easement. This matter was therefore improperly allowed by the arbitrators, and was not within the submission.

The allowance of the further sum of \$50, for building a cross road for the plaintiff's use, and entirely on his own land, was improperly made. This matter has no relation to the value of the land taken, nor to the value of the land remaining. It is merely a matter of personal convenience to the plaintiff, in the use of his farm, which the town are under no obligations to provide him with or make compensation for. The selectmen, under the act, could not have made any allowance or compensation to the plaintiff, for either of those matters, and therefore could not have legally sub-

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mitted them to arbitration. The remaining \$108,75 was allowed for building a fence on the line of the new road, and was properly submitted and taken into consideration by the arbitrators; and for this a recovery should be had in this action, unless the award is rendered inoperative and void, in consequence of those matters having been considered and determined, which were not submitted to their consideration.

The important inquiry in the case, therefore, arises, whether a recovery can be had in this suit for the matters properly allowed in the award, by disallowing those matters for which damages should not have been given, and for which the town are under no obligation to make compensation. As a general rule, an award may be good in part, and bad in part. It may be bad for one thing, and good for another. In 3 Phil. Evid. 1027, it is said that if the submission be of a particular subject, and the award cover that, and "another subject, yet, if there is no connection between the two, "and they are in no wise dependent upon each other, it shall be "enforced as to the one within the submission, and held void as to "the other." *Baron v. Miller*, 1 Cow. 117. *Clement v. Dargis*, 1 Greenl. 300.

It appears from the exceptions, "that the arbitrators *made and verbally published their award* to the plaintiff, and the selectmen; and as a part of the award, and publication, the arbitrators stated that forty dollars was allowed for the discontinuance of the old road, and fifty dollars for building the cross road." It is also stated, "that the award was in fact made up in the manner and of the distinct sums so declared by the arbitrators." The statement of the aggregate amount of the award by the arbitrators will not render the award entire and indivisible, when from the facts appearing on the face of the award, it appears to have been made up of distinct matters, having no connection with each other, and the amount allowed on each matter is capable of being definitely ascertained. Neither will such an effect be produced, because subsequently to publishing the award, the arbitrators gave to the selectmen, at their request, a written statement of the amount of the whole award, which was designed for their use, and not for the plaintiff, and never intended as a publication of the award. We must regard the award, therefore, as having been verbally made, consisting of distinct matters and having no connection with each

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other. Under such circumstances, the case falls within the rule above mentioned, and which is well sustained by the authorities. The plaintiff was, therefore, entitled to recover the sum of \$108,75, which was allowed by the arbitrators for building the fence along the line of the new road.

If this had been an action of debt on bond for the performance of an award, perhaps, it would have been more proper to have set up that part of the award which is valid, and to have merely assigned a breach of that, as the non-performance of that part only, would constitute a breach of the bond. 2 Saund. 298, note 1.—Watson on Arbit. 185. But in this action of assumpsit, we think, it was competent for the plaintiff to declare for the aggregate amount of the award, as the matters of which it was composed were expressly submitted by the plaintiff and the selectmen, and they agreed to abide by it. But that agreement, as to some of the matters submitted, is not binding on the town. Those matters, therefore, which were improperly allowed by the arbitrators, and which can be definitely ascertained and computed, may be disallowed, and a recovery had for the balance; the same as in an action on note, where its consideration consists of several distinct things, each of which is distinct from the others, and the precise amount of reduction to be made is a matter of definite calculation. In such case, on a failure of a part of the consideration, the note will be reduced *pro tanto*, and a recovery will be allowed for the remainder. *Paris v. Stone*, 14 Pick. 198, 210. 2 Greenl. Evid. § 136.

The declaration also contains the general counts, under which the plaintiff seeks to recover the amount of three town orders, two of which were payable to Mr. Follett or bearer, and the other to the plaintiff. The two orders given to Mr. Follett were disallowed by the court. In relation to the order dated Jan. 7, 1851, we think it was improperly disallowed, and that the plaintiff was entitled to recover its amount. It has all the elements of negotiable paper, and when such orders are drawn, presented for payment, and payment refused, they are negotiable, and can be prosecuted in the name of the indorsee; and on common principles, a recovery can be had in assumpsit under the general counts, on all negotiable paper, whether the action is between the immediate parties to the instrument, or whether brought by the indorsee against the maker of the note, or acceptor of a bill. The order dated Feb-

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ruary 28, 1852, was properly disallowed, as no demand for payment was made previous to the commencement of this suit. A demand for payment on the town treasurer, is necessary by statute.

We think there was error also, in the allowance of the order dated March 18, 1851, upon which a recovery was had. When this order was delivered, it operated as a satisfaction of the amount for which it was given, so that no suit could be sustained on that matter. The remedy of the party is only upon the order itself, and no recovery can be had on the order, until it is presented to the town treasurer. As this order was never presented for payment, no recovery can be had on it, nor on the consideration for which it was given. Comp. Stat. 118 § 48, 49. 119 § 56.

The result is, that the judgment of the County Court must be reversed, and the case remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDSOR.
MARCH TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

STATE v. JOHN PARKER.

Legislation. Submission of Laws to the People.

The Maine Liquor Law of Vermont was passed to go into effect on the second Tuesday of March, 1853, with a proviso, that a vote should be taken in relation to the time when the act should go into operation, and if a majority of the votes cast should be "no," then the act should go into operation in December, 1853—*Held*, constitutional.

THIS was an Information in one count, filed by the State's attorney under the license or liquor law passed at the October session of the legislature in 1852, and approved November 23, 1852.

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Plea, not guilty and trial by jury.

The evidence tended to prove four distinct offences.

The counsel for the respondent, requested the court to charge the jury that under the information they could not find the respondent guilty of more than one offence.

The court,—COLLAMER, J., presiding,—declined so to charge, and did charge the jury that the testimony tended to prove four distinct offences, and if they believed the witnesses, they would find the respondent guilty, and would say of how many offences he was guilty.

The jury returned a verdict of guilty, and that four offences were proved.

After verdict, and before judgment in said cause, the respondent moved an arrest of judgment for this, that the said information is insufficient in law to warrant a conviction. The court overruled the motion. To the charge and decision of the court, the respondent excepted.

J. S. Marcy for respondent.

I. This prosecution is based upon the "Liquor Law" of 1852, § 5.

The sale is alleged on one day only, and but one sale was proved on any one day. Therefore the court should have charged as requested. The form shows that offences committed on *different days* cannot be shown under one single count, though various violations on the same day may be.

Had the respondent pleaded guilty in this case, of what would he have pleaded guilty, and what would have been his sentence?

2. The motion in arrest should have prevailed, 1st. because two distinct, dissimilar and substantive offences are set forth in one count, to wit, *selling* and *furnishing*. The statute in the form distinguishes these as two offences. See form.

2dly. The act is unconstitutional in many of its provisions, and the whole act is thereby vitiated. Article 10, of part. first of the state constitution ordains, "That in all prosecutions for criminal offences a person hath a right to demand the cause and nature of his accusation."

Sec. 18, of this liquor act, which imposes the fine for this offence

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and prescribes the forms &c., presumptuously and *expressly* assumes to "set at naught" this provision of the constitution.

Again, this section of the act gives an *express license* to the government attorney to suppress and conceal from the respondent all knowledge of the "nature and cause" of the offence, he intends to convict him of until such knowledge, for the first time bursts upon him *through the evidence on trial*; and it contains also a mandate to the court to "adjudge" and "sentence" upon a conviction brought about in this way, and to impose fines, forfeitures and penalties, far more severe than that which is prescribed for the offence which, and which only, is set forth *in the information*.

3. Passing over many other objections which go to the validity of the law, we come to section 27, which reads as follows: "The foregoing provisions of this act shall take effect on the second Tuesday of March next; provided, that if a majority of the ballots to be cast as herein after provided, shall be "no," then this act shall take effect on the first Monday of Dec., A. D. 1853."

That this section of the act is repugnant to the constitution there cannot be a doubt, and it is equally clear that its unconstitutionality infects the whole act.

The constitution, in the 3d Article of amendments, provides that, "The supreme legislative power of this state shall hereafter be exercised by a senate and the house of representatives, which shall be styled The General Assembly of the State of Vermont." See also U. S. Constitution.

By thus delegating the legislative power to said assembly, the people necessarily divested themselves of it; else there must be more than one legislature; and the body to which it was thus assigned has *no where* the authority given to remit to the people the exercise of it. *Bradley v. Baxter*, American Law Register, Sept. No. 1853, Vol. 1 No. XI, page 658. *Bancroft & Riker v. Dumas*, 21 Vt. 456 and authorities there cited.

The fixing of the time at which an act shall take effect is as properly and exclusively within the province of legislative power as is the enactment of any other provision of a law, and the expediency of enacting any part or the whole of this law would as legitimately have been submitted to the decision of the people as would this section, which prescribes the time for the commencement of the operation of the law.

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This time was not definitely fixed by the legislature, but that body referred it to the people to determine whether the act should be law *for and during the time intervening from the second Tuesday of March, to the first Monday of December, 1858.*

If the vote of the people may decide whether an act shall be law for any time, why not for all future time, or as is usual, for such time as the law shall remain unrepealed?

It is admitted that conditional laws may be enacted, to take effect only on the happening of some contingent or uncertain event; but such event or circumstance must be some way connected with, or related to the subject matter on which the law is intended to operate.

The law was incomplete in itself, when it left the hands of the legislature, for the reasons above assigned.

O. French for State.

1. The charge of the court below is fully sustained by the decision of this court in the case of *Howard on Habeas Corpus*, in Addison county, the present circuit; in which the court are reported to have decided, "That though the complaint or information for a violation of the license law of 1852, contain but one count, five distinct offences could be proved and a fine imposed for each."

Besides, the Act § 18, provides, "That for every distinct act of selling &c., the court shall impose a fine for each offence."

The license law of 1846, has received a similar construction.—*State v. Smith*, 22 Vt. 74.

2. Another ground for arresting the judgment, as would seem from the exceptions, is, "That the information is insufficient in law to warrant a conviction." How much the respondent's counsel means by this indefinite objection is not readily perceived, no particular defect being named.

If by it is meant the law is unconstitutional, I apprehend it is now quite too late for this objection to prevail. This question is ably discussed and decided in the case of *Bancroft et al. v. Dumas*, 21 Vt. 456. Also in 22 Vt. above cited. And this court last year in this county, as I insist, decided this point. *Powers' case, Habeas Corpus.*

As well might the court hold all prohibitory laws unconstitutional; such for example, as the law against *gaming, lotteries, horse*

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rating, &c. It is not necessary to regard the violations of the license law of our state, a crime technically, *mala in se*, but a thing prohibited by our statute, and though its violation may become a *crime* under certain circumstances, it is or may not be so regarded indiscriminately; a sale or furnishing may be a technical breach of the law, though no moral wrong was intended or even committed; such cases are only rare exceptions to the most general and obvious result of a violation of this as of other prohibitory laws; and whether *mala prohibita* simply, or *mala in se*, each are to be construed alike, that is, each a breach of duty, and punished by fine or otherwise.

The opinion of the court was delivered by

REDFIELD, Ch. J. This was an indictment for selling and giving away spiritous liquors, contrary to the statute of 1852. One ground of exception to the conviction, was the unconstitutionality of the law of 1852, by reason of its being submitted to the people at what time the law should come in force. It was provided, in the statute, that it should come in force on the second Tuesday of March, 1853; with a proviso, that the meetings of the freemen of the state should be holden on the second Tuesday of February, 1853, to vote upon "Their judgment and choice in regard to this act," and "if a majority of the ballots cast shall be "no," then this act shall take effect in December, 1853." The vote was "yes," and this offense occurred before December, 1853.

The subject of the legality of such enactments has been somewhat discussed, in this state, and in many of the other states. In *Bancroft et al. v. Dumas*, 21 Vt. 456, the license law of 1846, was under consideration. By that law it was to be annually submitted to the vote of the freemen, whether licenses should be granted, or not. This was, in effect, submitting quite as much to the discretion of the people as in the case before the court, but in a somewhat different form. So that the case is not altogether decisive, perhaps, of the one before us.

The decisions in the other states, which have come to our notice, are, most of them, quite aside of the direct question. The statute in the case of *Rice v. Foster*, 4 ~~Harrison~~ 479, seems to have been a mere proposition to the people, to pass such a law, and as such, certainly differs, in form at least, from this statute. *Parker v. The*

Harrington
Delwate R.

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Commonwealth of Penn., 6 Barr. 507, is not the case of a general law, but only an attempt to enforce an edict, or decree, so to speak, in a certain district, by the vote of the people of the district. The fact that this was not a general law, or, indeed, properly an act of legislation, was probably sufficient reason for disregarding it. And it is understood that the general question of the legality of statutes, made dependent upon the contingency of a popular vote, was ruled in favor of the statute, in a subsequent case, in the same state. *Commonwealth v. Williams*, 11 Penn. 61. See also 8 Barb. 391. 9 Barb. 685. 10 Barb. 214. 20 Ohio App. 1. *C. W. & F. R. R. v. Clinton Co.*, 1 Ohio N. S. 77. Some or all of which, to some extent, countenance such statutes. The case of *The People v. Collins*, in the State of Michigan, in regard to their license laws, is where the court were equally divided upon the main question, and of course is not authority, either way. The case of *Bartow v. Himrod*, in the New York Court of Appeals, in regard to their school law, is a clear, unqualified decision, in July, 1853, against such a law, when its entire force is made dependent upon the vote of the people at large. Many of the Supreme courts of that state had, upon consideration and argument, held otherwise. The comparative force of these determinations would, doubtless, be different, out of that state, from what it is there. We have, then, as far as I know, the decision, in Delaware and New York, against such statutes, and the other cases referred to, more or less countenancing them, and the court equally divided in the state of Michigan. So that there is no considerable preponderance of authority either way. We must, then, look at the matter upon principle.

In this state, the constitution vests the legislative power in the general assembly, consisting of the house of representatives and the senate; and if the mode of proceeding under consideration is equivalent to giving legislative power to the people at large, it is, no doubt, in conflict with the constitution. But it is not very obvious, to us, why this should be so regarded, unless it is done as matter of argument, and to justify a foregone conclusion, which is not one of the legitimate elements of a judicial determination, more than it is of a legislative act, that it shall have the sanction of the people. But the law of 1852 did not, even in form, depend upon the vote of the people for its coming in force. The statute, in terms, was made to come in force just when it did, on the second

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Tuesday of March, 1853—and if there had been no meetings of the freemen called, or no vote had been taken, the statute would still have become a law just when it did. The only thing made contingent and conditional in the statute, was, in one single event, the operation of the law should be suspended until after the next session of the legislature. It may be said, this difference is not much. I know that very well. But it is as much as that between a condition precedent, and subsequent; and this, in the case of an illegal condition, as it is claimed this was, is quite important. In the former case, the contract or act is rendered void, and in the latter, the condition is only avoided, and the contract or act remains in force. And we do not see, but, upon sound reasoning and good logic, the result must be the same, in regard to statutes. We think it must, and should be. The condition or proviso was only for suspending the operation of the statute: and if the legislature had no right to annex any such condition, then the statute will not be affected by it. It might have been wholly disregarded by the people, and the effect must have been the same—the law would have come in force on the second Tuesday in March. And did the taking a vote (which was in the affirmative besure, but which, if it had been in the negative, was, it is claimed, of no force, and should consequently have been disregarded,) make the legal state of the enactment any different? We think not. And thus the form of enacting this statute seems to steer quite clear of the main argument, upon which all the cases have gone, where similar statutes have been held invalid. And, in regard to the statute of 1852, it cannot, with any show of fairness, be said the legislature did not enact the law, and fully pass upon all questions of constitutionality or expediency involved in the subject. And it is admitted on all hands that the legislature may enact laws, the operation or suspension of which shall be made to depend upon a contingency. This could not be questioned, with any show of reason or sound logic. It has been practiced in all free states for hundreds of years, and no one has been lynx-eyed enough to discover, or certainly bold enough to declare, that such legislation was, on that account, void or irregular. And it is, in my judgment, a singular fact, that this remarkable discovery should first be made in the free representative democracies of America; and in regard to taking the sense of these same people, upon the expediency of legislation,

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where the legislators are confessedly the mere agents and instruments of the people, to express their sovereign and superior will, to save the necessity of assembling the people in mass ; and when, from the very nature of the case, the representative is, in honor and good faith, bound to conform his action to the will and desire of his constituents.

Does any one seriously doubt the perfect propriety of the legislature, upon questions of general policy, affecting equally the whole state, acting upon the known will of the state, where that is known ? We suppose not. And if the sessions of the legislature were long enough, this might be ascertained during the session—as it is to a considerable extent, sometimes—by petitions, and legislation made to conform to such informally expressed will. But if the sessions are too short, and a more formal expression of the will of the people is desired, it amounts to the same thing practically, to provide that the law shall not come into full operation until the people have had an opportunity to say whether they are prepared to conform to the required change. And in regard to these great moral, social, and economical reforms, can it be doubted that the question of the preparation of the public mind to sustain them, firmly and quietly, lies at the very foundation of all hopeful legislation on the subject ? And is this not precisely what American legislatures both state and national have always, in effect, although not in form, been accustomed to do ? The legislatures have the power to alter county and town lines, and the places of holding courts. But legislation upon these subjects is made to conform, as far as practicable, to the supposed wishes of those interested ; and numerous statutes upon these important subjects, whose binding force has never been questioned, have, in terms, been made to depend for their whole force and vitality upon the future contingency of the expressed and recorded corporate vote of those interested. Congress passes laws, almost every session, whose operation is made contingent upon the revenue laws of foreign states, or their navigation laws or regulations, and upon a hundred other uncertainties, more or less affected by the will or agency of voluntary beings or communities ; and in most of these cases the suspension or operation of the enactment depends ultimately, perhaps, upon the mere will and agency of our executive government ; and of the perfect regularity and constitutionality of such enactments no question

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was ever made. Numerous other instances may be found where statutes have been made dependent upon future contingencies, not only for the time of their coming in force, but for their very vitality; and no question of their validity has ever been made upon that ground. This is all recognized as sound law and established precedent by those courts and by those judges who have attempted to argue that a law, made dependent upon a popular vote, was different in principle from one dependent upon other contingencies. But all such attempts seem to me altogether illusory, and, to some extent, captious, not to say frivolous.

[If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and a fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one.] And to us the contingency upon which the present statute was to be suspended, until another legislature should meet and have an opportunity of reconsidering it, was not only proper and legal, and just and moral, but highly commendable and creditable to the legislature who passed the statute; for, at the very threshold of inquiry into the expediency of such a law, lies the other and more important inquiry, are the people prepared for such a law? Can it be successfully enforced? These questions being answered in the affirmative, he must be a bold man who would even vote against the law; and something more must he be who would, after it had been passed with that assurance, be willing to embarrass its operation or rejoice at its defeat.

After a full examination of the arguments by which it is attempted to be maintained, that statutes made dependent upon such contingencies are not valid laws, and a good deal of study and reflection, I must declare, that I am fully convinced—although at first, without much examination, somewhat inclined to the same opinion, that the opinion is the result of false analogies, and so founded upon a latent fallacy. It seems to me that the distinction attempted between the contingency of a popular vote and other future uncertainties, is without all just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than choice—rather to escape from an overwhelming analogy, than

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from any obvious difference in principle in the two classes of cases ; for, as has been mentioned, one may find any number of cases, in the legislation of congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or, it may be, by the *people of these states*, and, in others, by the lords of the treasury, or the boards of trade, or by the proclamation of the sovereign ; and in all these cases, no question can be made of the perfect legality of our acts of congress being made dependent upon such contingencies. It is, in fact, the only possible mode of meeting them, unless congress is kept constantly in session. The same is true of acts of congress by which power is vested in the President to levy troops or draw money from the public treasury, upon the contingency of a declaration or an act of war committed by some foreign state, empire, kingdom, prince, or potentate. If these illustrations are not sufficient to show the fallacy of the argument, more would not avail.

Judgment, that the respondent take nothing by his exceptions and motion in arrest, and a fine to the state treasury of — and costs.

WILLIAM STRONG v. WILLIAM ELLSWORTH.

Trover. Estoppel in Pais.

He who by his words, or his actions, or his silence even, intentionally or carelessly, induces another to do an act, which he would not otherwise have done, and which will prove injurious to him, if he is not allowed to insist upon the fulfillment of the expectation upon which he did the act, may insist upon such fulfillment ; and equally if he has omitted to do any act, trusting upon the assurance of some other, thus given, and which omission will be prejudicial to him ; if the assurance is not made good, he may insist it shall be made good.

But where the plaintiff had a lien upon certain cattle in possession of T., and while so in his possession he sold them to defendant, and while defendant was passing with his drove one W. informed plaintiff, that defendant had bought the cattle, and pointed them out in the drove, and plaintiff supposed that

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W., to whom he had made known his lien, and who was solvent, had sold them to defendant, and would be accountable to him for the cattle or his claim upon them; it was *held*, under this state of facts, that the omission of the plaintiff to notify defendant of his lien upon the cattle, did not operate as a waiver of his lien.

The plaintiff, in about one-half hour after the defendant so passed with the cattle, was informed that T. sold them to defendant—*Held*—that plaintiff was then under no obligation to pursue defendant and give him notice of his lien; but that he might at once have commenced his suit for the cattle, and that there would then have been no ground of estoppel; and that plaintiff did not sue, as early as he might, is no ground of estoppel short of the term of the statute of limitations.

TROVER for two two year old heifers and a calf.

Plea the general issue and trial by jury.

On the trial, the plaintiff offered testimony tending to prove that in the spring of 1851, he sold to one Tisdale the two heifers named in the declaration, for \$26, and that he was to receive towards that sum, in one year from that time, two other heifers, then to come two years old, at such price as should be agreed upon, or as should be determined by men to be agreed upon, and that the two heifers, so sold, should remain his property until they should be paid for; that in the fall of the same year one of the said heifers had the calf mentioned in the declaration, and that soon after one Chamberlain Whitcomb, at the request of Tisdale, drove the said heifer and calf from the pasture, where she was kept to his own house, for the purpose of taking care of her; and that soon after said Whitcomb, at the request of Tisdale, proposed to sell the said heifer to the plaintiff who was desirous of purchasing a milch cow; that plaintiff then informed said Whitcomb of the terms of the trade, in respect to the heifers, and told him, if he sold the heifers, or drove them from the place where they were then kept, he, should look to him for payment for them. That the same autumn plaintiff was informed by said Whitcomb, that the heifers had been that morning sold to the defendant, who was then passing with a drove of cattle where they stood, and pointed out to the plaintiff the said heifers in the drove, and that plaintiff then supposed that said Whitcomb had sold them, and therefore refrained from giving the defendant any notice of his claim upon the heifers, knowing Whitcomb to be good, and supposing that he had bought them of

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said Tisdale, and would pay the plaintiff at the expiration of the year.

The evidence on the part of the defendant tended to prove, that whatever Whitcomb did in respect to attempting to sell the heifers to plaintiff and others, was done at the request of Tisdale, and for his benefit; that said Whitcomb had no notice of plaintiff's claim upon them; that the heifers were in fact sold to the defendant by Tisdale, on the morning of the day that they were so seen by plaintiff in defendant's possession, and that Tisdale was paid a reasonable price for them, in money, by the defendant; that immediately after, and while defendant was driving the heifers past where the the plaintiff stood, plaintiff was informed by Whitcomb that Tisdale had sold the heifers to the defendant, and that the the heifers were then seen by plaintiff, in defendant's possession, and that plaintiff gave no notice to defendant of his lien upon the heifers. That about one half hour after defendant had so passed with the heifers, the plaintiff was fully informed by one James E. Whitcomb, in the presence of Tisdale, that Tisdale had sold the heifers to the defendant, and the price he obtained for them; and that the plaintiff did not then make any objection to the sale, nor then nor ever, until after the decease of Tisdale, which occurred that winter, give notice to the defendant that he had any claim upon the heifers.

The defendant requested the court to instruct the jury, among other things, that if the plaintiff was informed and had knowledge, at the time he saw the heifers in possession of the defendant, as before stated, that they had been sold to the defendant by Tisdale, and Tisdale had received the pay for them, it was his duty to have given notice then to defendant of his claim upon the heifers, and that his omission to do so until after the decease of Tisdale, was a waiver of his specific lien upon the heifers as against the defendant; and that if the plaintiff was then informed, or supposed that Whitcomb had sold the heifers to the defendant by the procurement of Tisdale, or under any arrangement between him and Tisdale, it was his duty to have given notice to the defendant of his claim upon the heifers, and that his omission to do so was a waiver of any such claim, as against the defendant; and that if plaintiff was informed, within half an hour afterwards, that Tisdale had sold the heifers to the defendant, and received the pay

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for them, it was his duty then, or within a reasonable time thereafter, to have given notice to the defendant of his lien upon the heifers, and that his omission to do so was a waiver of such lien.

The court charged the jury, that if the plaintiff was informed, when he saw the heifers driven by the place where he stood, and in possession of the defendant, that Tisdale had sold the heifers to the defendant, the omission of the plaintiff to give notice then, to the defendant of his lien upon the heifers, would be a waiver of such lien; but that his omission to give such notice to the defendant, if he was then informed or supposed that the heifers had been sold to the defendant by Whitcomb, would not be a waiver of such lien; and that notwithstanding the plaintiff was informed, within half an hour afterwards, in the manner which the testimony tended to prove, that Tisdale had sold the heifers to the defendant, and received the pay for them, he was under no obligation by reason of such notice, to give any notice to defendant of his lien upon them, and his omission so to do, would not, in this state of facts, be any waiver of his lien.

The jury returned a verdict for plaintiff.

To the charge of the court, and to the refusal to charge as requested, the defendant excepted.

Washburn & Marsh and *A. P. Hunton* for defendant.

The defendant was a *bona fide* purchaser, without notice, and such purchasers are said to be the favorites of the law. Notice to him, at that time would have enabled him to preserve his rights, as against Tisdale, and this was within the knowledge of the plaintiff. The owner of property, if he would claim protection of courts, must perform all those duties which equity and good conscience require of him; and the most important of these duties, as to innocent third persons, is the assertion of his rights, whenever reasonably required. The rule is, that "if a person maintain silence, when in conscience he ought to speak, equity will debar him from speaking, when conscience requires him to be silent." *Hall v. Fisher*, 9 Barb. Sup. Ct. 17.

If the owner of property stand by and see a third person sell it, and maintain silence, he cannot afterwards assert title to it, as against the purchaser. *Roe v. Jerome*, 18 Conn. 153. *Cross v. Marston*, 17 Vt. 541.

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Possession, in such case, as in this, is *prima facie* evidence of ownership, and the principle, which, in that case, will preclude the party from subsequently asserting his claim, will give the same effect here, where the plaintiff seeing the defendant drive away the cattle, and knowing that he had in good faith purchased them, and that it was then in defendant's power to rescind the sale and place himself in *statu quo*, yet omitted to assert his claim. It is within the rule stated by NELSON, J., in *Welland Canal Co. v. Hathaway*, 8 Wend. 483, that the acts and admissions of the party operate against him in the nature of an estoppel "*where in good conscience and honest dealing he ought not to be permitted to gainsay them.*" And in 2 Smith's Lead. Cas. 532, it is said that "the same reason exists in all cases, *where the owner of property sanctions a purchase from a third person, whether expressly or only by implication.*" *Prichard v. Sears*, 6 A. & E. 469, and *Gregg v. Wells*, 10 A. & E. 90, are strong illustrations of this principle; and the same is recognized in *Stevens v. Stevens*, 2 Coll. 20.

So where one lies by, while he sees another person expend his capital, &c, he is precluded from subsequently asserting rights to the injury of such person. *Parrott v. Palmer*, 3 M. & K. 632. *Hall v. Fisher*, 9 Barb. Sup. Ct. 17.

So where one assumes, without authority, to act as the agent of another, either in the disposition of his property, or in any other respect, a subsequent ratification, which will have all the effect of a precedent authority, and preclude the principal from asserting inconsistent rights, may as well be by an omission to disclaim, after notice, as by an express subsequent assent. Broom's Leg. Max. 382. *Frothingham v. Haley*, 3 Mass. 70. *Shaw v. Nudd*, 8 Pick. 9. *Prince v. Clark*, 1 B. & C. 186. *Errick v. Johnson*, 6 Mass. 196.

And the same principle has a most important application to cases arising upon bills of exchange and promissory notes. The party who, by omitting to assert his rights, places an innocent third person in a position where he may sustain injury, is estopped from afterwards asserting those rights equally with the party, who, by his acceptance, gives credit and currency to a forged bill of exchange. *Price v. Neale*, 3 Burr. 1354. *Smith v. Mercer*, 6 Taunt. 76. *Carridge v. Allenby*, 6 B. & C. 373. *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

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If the plaintiff's supposition, that the sale had been effected by Whitcomb, justified him in then omitting to give such notice, yet, having received ample notice, within half an hour, that *Tisdale* had in fact sold the cattle, and received the pay, his omission to give notice of his claim until after, in the course of the next winter, *Tisdale* had deceased, was a full and ample recognition of the authority of *Tisdale* to sell, and of the sale as made.

Converse & Barrett for plaintiff.

The claim of defendant, as well as the charge of the court rest upon and involve the law of *equitable estoppel* or *estoppel in pais*.

1. Is the plaintiff estopped to assert his title by having omitted to give notice of it, in case he was informed, or supposed Whitcomb had sold the heifers, as set forth in the exceptions?

2. Is plaintiff so estopped by having omitted to give notice of his title on being informed of the sale by *Tisdale* one half hour after the defendant passed along with the drove?

The same principles of law and the same decided cases apply equally to both branches of the charge. *Davis et al. v. Bradley & Co.*, 24 Vt. 60, citing from *Smith's Lead. Cas.*, and citing and adopting the law as stated by *BRONSON, J.*, in *Dazell v. Odle*, 3 Hill 215, which see, and the cases cited. See also, in the same case, the law as stated by *COWEN, J.* "An admission intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct prejudicial to his interest, unless the party estopped be cut off from the power of retraction. This I understand to be the very definition of *Estoppel in pais*."

See also, 2 *Smith's Lead. Cas.* (Ed. 1847,) p. 584. *Story's Eq.* 375 § 385, 386. *Pickard v. Sears et al.*, 33 E. C. L. 116, and latter clause, page 117. *Morton v. Hodgdon*, 32 Maine 127. *Copeland v. Copeland*, 28 Ill. 525, 539, 540. *Whitaker v. Williams*, 20 Conn. 103. *Story on Agency* § 91.

The case under either branch of the charge lacks all the elements of an *estoppel*.

1. The omission to give the notice to defendant, had no influence upon him in making the purchase. It had been made, and the

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money paid, and possession taken of the property sometime previous to the time when it is claimed notice should have been given.

2. It does not appear, (though defendant was a witness,) that he has suffered any injury. There was no testimony tending to show that he would have undertaken to rescind the trade and reclaim the money, or that he would have succeeded in getting back his money if he had so undertaken.

3. As the case stands on the second point of the charge, the inference is precluded, that the omission to give such notice renders it contrary to *good conscience and fair dealing* for plaintiff to assert his title. *H—— v. Rodgers*, 9 B. & C. 577, cited in 3 Hill 224. He was acting upon the fact as he understood it by information from Whitcomb, and therefore had no occasion either for purposes of his own safety, or of preventing possible injury to defendant, to give any notice of his title. So too, as the case stands on the third point of the charge, there is nothing indicating, much less showing, that it is *contrary* to *good conscience and fair dealing* for plaintiff to assert title as against the defendant. In order to make it so, it should have been shown, that defendant had suffered injury by not receiving the notice—that plaintiff was able and had the means of giving the notice—that defendant was accessible, so that notice could have been given to him.

Again—Estoppel can result only from the facts *shown*, and not by *inference* and *intendment*. All its elements must appear clearly and with certainty. It is matter of law, arising upon facts found. 2 Smith's Lead. Cas. (Ed. 1847,) 536. Co. Lit. 352.

In fine ; we claim that upon any facts which the testimony tended to show, an estoppel cannot be operated upon any known principle of law.

All the cases put the doctrine of this kind of estoppel on the ground that the party's words, or acts induced reliance on a given state of facts, *at the time of the transaction* between the other parties. 17 Vt. 455—"If one man has made representations which he expects another may or will act upon, and the other does, in fact, act upon it, he is estopped to deny the truth of the representations."

28 Vt. 449—"The owner of land, who stands by and aids in the execution of a deed of such land by a stranger, and himself

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becomes a witness of the conveyance, is thereby estopped to deny that the *title passes*."

The opinion of the court was delivered by

REDFIELD, Ch. J. The doctrine of *estoppels in pais* is one, which so far at least, as that term is concerned, has grown up chiefly within the last few years. But it is and always was a familiar principle, in the law of contracts. It lies at the foundation of morals, and is a cardinal point, in the exposition of promises, that one shall be bound by the state of facts which he has induced another to act upon. He who by his words, or his actions, or by his silence even, intentionally, or carelessly, induces another to do an act, which he would not otherwise have done, and which will prove injurious to him, if he is not allowed to insist upon the fulfillment of the expectation, upon which he did the act, may insist upon such fulfillment. And equally if he has omitted to do any act, trusting upon the assurance of some other thus given, and which omission will be prejudicial to him, if the assurance is not made good, he may insist, it shall be made good.

But in applying this rule, to the present case, it would seem the county court did give the defendant the full benefit of it. It is not claimed, that the plaintiff gave any encouragement to the sale, or that he was guilty of any misconduct, in regard to it, until the defendant had purchased the property, and driven it off and had been gone half an hour, with his drove. It is not claimed, that it was then the plaintiff's duty to have pursued defendant. And it does not appear, that plaintiff had any other opportunity, to have informed the defendant of his lien, upon the property. It is only said, that when informed of the sale, in the presence of Tisdale, by Whitcomb, he did not object to the sale. But there is nothing in the case to show, that this had any tendency to mislead the defendant, or that the plaintiff was in any manner called upon, at that time, to make a formal declaration of his claim. In short there seems to have been no particular call upon plaintiff then to assert his title, and if not, his silence is not evidence against him, much less conclusive. *Vail v. Strong*, 10 Vt. 475. *Gale v. Spooner*, 11 Vt. 152.

And the objection that the plaintiff did not give notice to defendant, that he had any claim upon the property, seems to us by no

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means to indicate any intention to mislead the defendant, or any indifference to his interest, by which defendant has unjustly been misled, which is in any sense like that of the drawee of a bill accepting, or paying it, upon the credit of a forged signature of his own correspondent, which he is bound to know, or like that of a bank taking counterfeits of its own bills, which it is bound to know, and which the innocent holder, if told of, at the time, might stand some chance of obtaining redress upon. *Price v. Neal*, 3 Barr. 1354. *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

If there is any thing, which the testimony tends to show, that he should have done, which he did not do, it seems to us, it was to have pursued after the defendant, and informed him, at once, and while there was some reasonable probability, that the notice would be available to him. But this is so unreasonable an act, that it is not claimed. And we think, he might have sent a sheriff after him with a writ at once if he elected, and that there would then have been no pretence of an estoppel, and that he did not sue as early as he might, is no ground of estoppel short of the term of the statute of limitations. And giving notice to defendant is not shown to have been any more readily in plaintiff's power, and it is certain it would probably have been far more unavailing to defendant. And no one could have expected plaintiff to give notice to defendant, when first informed of the sale, and while he expected the sale was made by Whitcomb, who was entirely solvent, and whom the plaintiff had informed of the state of his claim, and that if he sold the cattle, he should look to him for pay; while he so understood the transaction, he would suppose Whitcomb the only one interested to know of his claim, and he had already informed him of all the facts concerning it.

It has been held, that a declaration will not take effect as an absolute estoppel unless it is made with a full knowledge of the right to be estopped, and with the design, or effect of creating an impression, that it does not exist, or will not be enforced. *Whitaker v. Williams*, 20 Conn. 98, id. 568. *Steele v. Putney*, 3 Shepley 327. In 2 Smith's Lead. Cas. 564, it is said, "That the rejection of evidence," on this ground, "is designed to prevent fraud on the one part, and injury on the other," and will not be extended beyond this. And a declaration made under a mistake of one's rights, either in fact, or in law, may be withdrawn. 20 Conn. 98.

Judgment affirmed.

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ELIPHALET S. PAIGE v. HOMER H. HAMMOND & OTHERS.

Trover. Contract. Sale.

It was agreed between the plaintiff and H., at a constable's sale, that plaintiff should bid off a quantity of hay and divide it, and that H. should not bid. If the plaintiff bid off the hay and H. did not bid, this would constitute a consideration for the contract; but *quaere*, whether such a consideration is allowable. But if the contract is valid, no property will pass while the contract is merely executory; and no property will vest in H., until he has paid or tendered the price.

And if there was evidence of a present executed contract of sale of a third of the hay, in common to H., still plaintiff had a right, by the general rules of law, to retain the thing until he was paid his money, for the price.

Where a contract requires concurrent acts of either party, the denial of the contract by one party, will not enable the other party to sue upon it, without showing a readiness, at least, to perform on his part.

A naked agreement merely, to purchase property for another, no funds being furnished and no general agency existing, vests no title in such other person, and if he takes the property forcibly, he is liable in trover.

TROVER for four tons of hay. Plea, *not guilty*, and trial by jury.

On the trial it was conceded, that the plaintiff bought at a constable's sale on execution, a mow of hay, in the barn of one Gilson, in Reading, and that afterwards the defendants took and carried away one third thereof; and testimony was introduced as to its value.

The testimony on the part of the defendants, was that of the defendant Hammond, who testified as follows:

"I knew of the constable's advertisement, for the sale of the hay at Gilson's barn, and before the sale day, he having some money collected for me, I spoke to him, and told him that I intended to bid on some of the hay, and wished if I bought any, that the money in his hands should apply on that, to which he assented.

On the sale day, the hay on a short scaffold and in a stable, was put up in one lot, and the plaintiff and myself both bid on it. I then told the plaintiff I would not bid against him, if he would go halves; to this he assented, and I bid no more, and it was struck off to him.

The hay, or mow of hay in the barn was then put up, for the

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bidder to take half or the whole. The plaintiff asked me if I had hay enough, and I told him I wanted some more, as I thought the half which had been bought would not winter my cow. He said Alfred Watkins wanted to go shares with him and myself, and said if we bid it off, we could take the whole, and divide it between ourselves.

The plaintiff bought the hay, and I did not bid on it."

His testimony tended further to prove, that he called three times on the plaintiff, to go and divide the hay, who declined at first on account of other engagements, but finally getting into a controversy, as to the matter of the scaffold hay, the plaintiff utterly refused to divide the mow, or permit said defendant to have any of it. At the third interview the said defendant informed the plaintiff that he had money in the constable's hands to pay for said hay. After this third interview the said defendant went with the other defendants, and took away one third of the said mow of hay.

The said defendant never informed the constable that he had any interest in any of said hay, or gave him any directions to retain, or apply any of his money therefor, and the officer received his pay for all of the hay of the plaintiff, but at what precise time did not appear, and paid to Hammond all the money he held for him.

The payment, by the constable to defendant, was after the commencement and appeal, of this suit, and after the defendant had been informed that the constable had been paid, in full for the hay by the plaintiff.

The County Court, December Term, 1853,—COLLAMER, J., presiding,—upon this testimony instructed the jury, that plaintiff was entitled to recover. Verdict for plaintiff.

Exceptions by defendants.

S. Fullam for defendants.

The testimony of Hammond tended to prove, that plaintiff bid off the hay, for himself, Watkins and Hammond, by and in pursuance of a previous agreement.

If this were so, the defendant had a right to take the hay, unless something intervened to prevent that right. The plaintiff might have insisted that inasmuch as he alone was liable for the payment of the price of the hay, that Hammond should pay before he took his third.

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No such thing appears, but the reverse, Hammond notified him that the money was in the constable's hands to pay for it, which was true.

The court then should have left it to the jury to determine whether the hay was bid off by the plaintiff, for himself, Watkins, and Hammond.

It is undoubtedly true, that the constable could have had his action, for the price of the hay against the plaintiff, Watkins and Hammond, if they agreed to have it bid off for them.

J. F. Deane for plaintiff.

There was no error in the charge of the court below.

1. The plaintiff and Hammond cannot be regarded as joint owners of the hay in controversy; for the case shows, that what passed between them, on the day of sale was but a negotiation, which, at the most, was but an executory contract, that was never perfected, therefore, Hammond was not an owner of a moiety of the hay, so as to be legally entitled to possession as against the plaintiff. *Whitney v. Lynde*, 16 Vt. 579. *Mason v. Thompson*, 18 Pick. 305.

2. The plaintiff purchased the hay at the constable's sale, and he alone was liable on his bid, at least, as far as was then known to the officer; and if there was such a consideration, as to make the naked agreement between the plaintiff and Hammond, on the day of sale, a valid and legal contract; (which it appears to me is more than doubtful,) still without a delivery, or division of the hay, the price not having been paid or tendered by Hammond, the plaintiff was the legal owner of the hay, and nothing had transpired to divest him of this right to the property. *Towsley v. Dana*, 1 Aik. 344.

To hold otherwise, would work rank injustice to the plaintiff; it would provide a way for Hammond to obtain the property without paying for it, and if irresponsible the plaintiff would loose it; but no one will question plaintiff's right to retain the property until the price is paid.

Hammond never, as the case finds, offered to pay the plaintiff for any part of the hay, nor did he ever inform the officer that he had any interest in the same. The plaintiff paid for the hay, and

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Hammond received his money from the officer, and judged by his own acts, he has no reason to complain.

Finally, it is clear that this property was legally and rightfully in the plaintiff, that it would have been liable to attachment on his debts; and as these defendants have taken the property without license or right, they are liable in *trover*. And as the case stands there was nothing for the jury, save the question of damages, which was submitted to them.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. The first question in the case, is whether the testimony had any tendency to show a *perfected sale* of the hay, either to defendant, Hammond at the sheriff's sale, or from plaintiff to him. For if the testimony had any tendency to show such sale, it should have been submitted to the jury. The testimony showed a naked agreement certainly, to bid off the hay, and divide with Hammond, giving him one third; and that the hay was subsequently bid off by plaintiff, and Hammond did not bid, relying probably upon his agreement with plaintiff. This would constitute a consideration for the contract, if such a consideration is allowable and I do not say it is not. I know of no case, which has questioned it, although it is very little more equitable on the one side, than employing puffers, on the other side. It has been held in this state, that an agreement to give a man money not to bid, at an auction is not a valid contract, being against sound policy, and this contract is very similar.

But if such a contract is valid, the party might undoubtedly have redress for any loss sustained by its non-fulfillment, but while it is merely executory, no property will pass. And such it seems to us was the nature of this contract. At the time the agreement was made it was clearly so; subsequently the plaintiff purchased the hay. Hammond paid nothing. His direction to the constable, in regard to the money of Hammond, in his hands, does not help the case, inasmuch as the constable was not informed, that one third of this purchase was for Hammond's benefit; and the direction of the constable was to retain the money, for any hay, which Hammond himself might purchase. There might have been some reason, why it was not desired to inform the constable of the purchase being for the joint benefit of three. But no order was given

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to the plaintiff to get the money of the constable. In short it was all, as it seems to us, left unfinished, depending merely upon the will of the plaintiff, or performance by him, and so was altogether executory.

It could not have been expected the property would vest in Hammond, until he paid the price. This he has not done, or offered to do, and there was nothing to excuse this, in any sense, until the disagreement about the other hay, and then the plaintiff altogether refused to execute this executory contract of sale, thus leaving the party to his remedy, for breach of the contract. It then became impossible for the defendant to acquire title to the hay, unless by resort to a court of chancery to compel a specific performance of the contract of sale, which would not be expected, in any ordinary case of sale of personal property.

II. It is questionable, whether the declaration of plaintiff had any reference to allowing the defendant, Hammond, to have any undivided interest in the hay. It looks like an encouragement, or contract to divide the hay and let him have one third in severalty. But if the testimony could be said to have any possible tendency to show a present executed contract of sale of one third of the property, in the mow of hay, in common, to Hammond, which it seems to us, it clearly had not, still the plaintiff had a right, by the general rules of law, to retain the thing, until he was paid his money for the price. And it is questionable whether the plaintiff's repudiating the contract of sale, will justify the defendant in taking forcible possession of the thing sold, until he tenders the price, or at least shows a readiness on his part to do so, and this made known to the plaintiff. For possibly the plaintiff might change his mind, and he ought, at least, to have the chance of taking the money for the price, before he parts with his goods, or they be taken forcibly from him.

III. And it seems very questionable to me, whether the defendant could maintain any action, upon the contract of sale even, if any such binding contract was made, without making a tender of the price, or showing readiness, at least, to perform, or being excused therefrom by some distinct act of the plaintiff. And it is not very obvious to my mind, that when a contract requires concurrent acts of either party, that the denial of the contract, by one party, will enable the other party to sue upon it, without showing

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a readiness, at least, to perform on his part. It might possibly excuse the formal offer, if the other party was made aware of an existing opportunity to receive the price, if he elected so to do. *Morton v. Lamb*, 7 T. R. 125. *Atkinson v. Smith*, 14 M. & W. 695. *Dakin v. Williams*, 11 Wend. 67.

Finally, an agreement made to purchase property for another, no funds being furnished and no general agency existing, whether the property is purchased, or not, and if purchased, whether with the purpose of delivering it to such other person or not, vests no title in such person, and if he take the property forcibly, he is liable in trover.

Judgment affirmed.

JOHN A. WHEELOCK v. LEWIS ARCHER & LEVI WILDER.

Trespass. Collector. Distress for Taxes, &c.

If a collector of a school district, call upon one legally assessed in the district, for the payment of a tax, which he holds against him for collection, and the taxpayer absolutely refuses to pay the tax, after such a refusal, the collector is not required to give further time, and specify the time and place, when and where he will receive the tax, but may if he elects, at once levy on the property of the one so refusing to pay. *Downer v. Woodbury*, 19 Vt. 329.

And where the collector justifies under his tax bill and warrant, the fact, that plaintiff promised that he would pay the tax that week, if he would leave the property upon which he had levied, can have no effect upon the collector's liability in an action for trespass, as the plaintiff's former refusal would justify the collector in proceeding with his levy, until the tax was paid.

The proceedings of the collector, subsequent to the levy, will be presumed to be correct, unless from facts existing in the case, they appear to be otherwise; and the fact, that in making an adjournment of the sale, he inserted "4 o'clock, A. M." instead of "4 o'clock, P. M.," will not render him a trespasser in making the sale.

And a person assisting the collector in making a legal levy, will not become a trespasser, by a subsequent abuse by the collector of his authority.

TRESPASS for a wagon, which the defendant, Archer took as collector of school district, No. 13, in Plymouth, the defendant, Wilder

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assisting the said collector, at his request, in drawing the wagon away. The suit was originally commenced before a justice of the peace, and came to the county court by appeal, and was referred, under a rule of court to a referee, who reported in substance the following facts :

That plaintiff proved the taking of the wagon ; and that defendant, Archer claimed that he took the same as collector of school district, No. 13, in Plymouth ; and defendant Wilder claimed that he acted under said Archer. That school district No. 13, is and was a duly organized district in said Plymouth ; that at a meeting in said district, of the legal voters, duly holden on the 27th day of March, A. D. 1850, said Archer was elected collector of said school district for the year then ensuing, and at said meeting they voted to raise sixty dollars, on the grand list, for the support of a school in said district ; and a tax bill and warrant was duly made out and put into the hands of said Archer, as collector ; and that the tax assessed, and entered upon said tax bill against the plaintiff was five dollars and three cents, (\$5.03.) That about three weeks before the taking of the wagon in question, and after said Archer had received the said tax bill and warrant, the said Archer called upon the plaintiff and asked him " if he could not pay his tax in a few days, as it was time that it was closed up ;" to this plaintiff made no reply. That about two weeks after this as the plaintiff was passing in the highway, a field where Archer with others were at work, haying, Archer again asked plaintiff to pay said tax ; that the plaintiff refused to pay it, and told Archer that he would never pay said tax to him.

That on the following day, July 24th, 1850, Archer went to the plaintiff's house with the said tax bill and warrant and levied the same on the wagon in question, and that after the levy, but before he removed the wagon, the plaintiff called for the tax bill and warrant, and Archer showed the same to him ; plaintiff then told Archer that he would pay the tax that week on Saturday, if he would leave the wagon ; that Archer insisted upon payment at that time, which plaintiff neglecting to make, he called upon the defendant, Wilder to assist him, and they drew the wagon away.

That said Archer advertised said wagon for sale, but the same had not been sold, when this suit was commenced, nor when the same was tried before the justice.

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That said Archer adjourned the said sale once, and in making the adjournment he inserted "4 o'clock, A. M." instead of "4 o'clock P. M.," which mistake was rectified sometime in the forenoon of the day upon which the wagon was sold.

The County Court, December Term, 1853,—COLLAMER, J., presiding,—rendered judgment on the report of the referee for the defendants.

Exceptions by plaintiff.

R. Washburn and Robbins & Chapman for plaintiff.

I. In this case the plaintiff insists, that Archer, the collector, was a trespasser in making the distress, mentioned in the report, before giving the plaintiff notice of the sum at which he was assessed, as required by the statute.

II. That he was also a trespasser in taking away the wagon, immediately after he had notified the plaintiff of the sum at which he was assessed, and after the plaintiff had promised to pay the tax to him, within three days, as shown by the report. Comp. Stat. 149 § 42—463 § 7—464 § 8, 9, 10.

III. That Archer, the collector, by his collusion with James M. Fullam, in relation to the disposition and sale of said wagon, and by his irregularity in the advertising and sale thereof, became a trespasser *ab initio*. *Moore v. Robbins*, 7 Vt. 367. *Sackrider v. McDonald*, 10 Johns. 253. *Pierce v. Benjamin*, 14 Pick. 356. *Smith v. Gates*, 21 Pick. 55. *Bond v. Wilder*, 16 Vt. 393. Gilchrist's Dig. Trespasser *ab initio*, 541.

IV. If Archer, the collector, was a trespasser, Wilder, in assisting him, was a co-trespasser.

S. Fullam for defendants.

The referee finds the following facts :

1. That school district No. 13, in Plymouth, was legally organized.
2. That the school tax was legally voted.
3. That defendant, Archer, was legally elected collector.
4. That the tax bill and warrant were legally made out and delivered to the collector.
5. That he was legally assessed in \$5.03, on said bill.
6. That the collector called on the plaintiff twice for his tax,

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and at the last time *he told him "he never would pay it to him."*

7. That defendant, Archer, took the wagon by virtue of his tax bill and warrant.

8. That defendant, Wilder, assisted him.

9. That plaintiff commenced this suit before the sale, &c.

These facts the defendants insist, constitute a good and legal defence to the action.

I. The collector is not bound to prove, that he notified the party when and where he would receive the tax. It would be unreasonable and wholly impracticable to have a witness with him when such a notice was given.

II. The law presumes the collector has done his duty, until the contrary be shown.

III. It would not make the levy at respass, if the collector failed to give the notice; he has a discretion on the subject, and if he wantonly or maliciously neglect to give the notice, he would be liable in an action for the damages thereby occasioned.

IV. Where the party refuses to pay, the notice is wholly unnecessary. *Downer v. Woodbury*, 19 Vt. 329.

The opinion of the court was delivered by

ISHAM J. The case of *Downer v. Woodbury*, 19 Vt. 329, is decisive in relation to the first objection which has been taken to the proceedings of the constable. It appears from the report that previous to the levy of the warrant on the wagon, the plaintiff had been called upon for payment of the tax, and that he refused to pay it. After that distinct refusal to pay the tax, it would be a useless ceremony, to require the collector to give further time, and specify the time and place, when and where he would receive it. It was so held in the case above referred to.

The promise made by the plaintiff, after the defendant, as collector, had levied upon the wagon, that he would pay the tax that week, if he would leave the property, and not take it away, can have no effect on the defendants' liability in this action. The plaintiff's former refusal to pay the tax justified the levy; and the collector had a right to proceed with the levy, until the tax was paid. The promise will have no effect in avoiding the consequences of his former refusal.

The proceedings of the collector, subsequent to the levy, will

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be presumed to be correct, unless from some fact existing in the case, they appear to be otherwise. The sale of the wagon was advertised, and we are to presume correctly so, as no fact appears to the contrary. An adjournment of the sale could be made by the officer in his discretion. The fact that in making the adjournment, he inserted "4 o'clock, A. M." instead of "4 o'clock, P. M.," was an obvious mistake, and could deceive no one. Its alteration, on the morning of the day of sale, would not mislead any one, as to the true time of sale intended in the original adjournment. In any event, we think, this matter would not render the defendant a trespasser in making the sale. *Spear v. Tilson*, 24 Vt. 420. The statute no where provides that an adjournment of the sale shall be in writing.

In relation to Mr. Wilder, who defends as the servant of the collector in making the levy, it is clear, that this action cannot be sustained against him for this matter. In the case of *Oysted v. Shedd*, 12 Mass. 511, it was held, "that a person assisting an officer in a legal process, will not become a trespasser, by a subsequent abuse by the officer of his authority, as he would be, if the original taking was illegal."

These being the only objections urged against the legality of the proceedings of the collector, the judgment of the County Court is affirmed.

LEVI RIX, ADMR. OF E. RIX v. EDWARD P. NEVINS.

Administrators. Judgments of different courts, when mutual in their character, may be offset in the discretion of the court.

Claims allowed by commissioners on the estates of deceased persons, are treated as judgments, except that they cannot be enforced by the final process of execution.

Judgments recovered in different courts, which are mutual in their character, may on motion be set off, one against the other; but the judgments not being in the same courts, the set off cannot be directed under the provisions of the statute, but the power to make the set off is derived from the equitable powers of the

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court, which the court exercise independently of the statute, and from the general jurisdiction of the court over the suitors in it; the application therefore must be addressed to the discretion of the court.

Where an administrator parts with the property or the money of the intestate, and takes a note for the same, he becomes personally liable, and a debtor to the estate of his intestate, and may therefore hold the note as his own.

And when the plaintiff, as administrator of the estate of R., commenced a suit upon certain notes, which R. in his life time had taken of the defendant, as administrator of the estate of L., (of which estate the plaintiff was also administrator *de bonis non*.) and obtained judgment against the defendant on the same; and the defendant filed his motion to be allowed, in offset to said judgment, a judgment of commissioners on the estate of said R., in his favor—*Held*—that the plaintiff having thus treated the claim against defendant as assets, and as the property of the estate of R., the same is subjected to every legal and equitable offset, which the defendant has against R. or his estate. And the judgments having thus been rendered mutual in their character, by the acts of the parties, the offset was allowed.

ASSUMPSIT on two promissory notes, for \$80, each, the first note dated at "Royalton, September 27, 1851;" the second note dated "Royalton, October 31, 1851;" and both notes were made payable to "Elisha Rix, Admr. of Geo. S. Lee's estate, or order."

After judgment for the plaintiff, for the amount of said notes, the defendant filed his motion in writing, to be allowed, in offset to said judgment, a judgment of the commissioners on the estate of said Elisha Rix, in favor of the defendant.

To the allowance of this motion, the plaintiff objected, and showed the court, that Elisha Rix was the administrator of George S. Lee, deceased, and took said notes of the defendant, as such administrator, as appears from said notes; that said Elisha Rix died insolvent, and that Levi Rix became administrator on the estate of said Elisha Rix, and also administrator *de bonis non* of the estate of the said George S. Lee; and the plaintiff claimed the right to pursue and collect said notes of the defendant, as assets, or effects, belonging to the estate of the said George S. Lee.

The defendant offered testimony to prove the following facts; (to the admission of which the plaintiff objected, on the ground that the testimony tendered to contradict the said notes;) but the court admitted the testimony, which tended to prove, that at the date of said notes, said Elisha Rix was indebted to the defendant, on notes and on account, in his private and personal capacity, and that he delivered the defendant the amount of money in said notes,

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now sued by the plaintiff, in payment of said notes and account due the defendant, and that the same was to apply thereon; and that said Elisha Rix then said, he wanted the two notes, described in the declaration, given to him in the way they were, merely as a memorandum, for his own accommodation in his own business, and that they were accordingly so given.

It also appeared, that soon after the decease of said Elisha Rix this action was commenced, and that afterwards the defendant presented his said notes and accounts against the said Elisha Rix, to the commissioners on the estate of said Elisha, and that the same were allowed, and the return of said commissioners was duly accepted, by the probate court.

The County Court, December Term, 1853,—COLLAMER, J., presiding,—allowed the defendant the offset prayed for in his said motion against the plaintiff's damages only, and ordered, that, for his costs, the plaintiff have execution, and that the balance due defendant, be certified to the probate court.

To the decision of the court, admitting said testimony, and allowing said offset, the plaintiff excepted.

Washburn & Marsh for plaintiff.

The set off should not have been allowed.

This is an application for the exercise of *equitable powers* of the court; its allowance is not a technical *act of discretion*, not open for revision, but is governed by fixed rules, within which the case must be brought, or the set off must be denied.

And the most important of these rules, and the one applicable to this case, is, that the set off will be denied, *whenever its allowance will injuriously affect the rights of third persons, not nominal parties of record.* *Conable v. Bucklin*, 2 Aik. 221. *Makspence v. Coates*, 8 Mass. 451. *Holmes v. Robinson*, 4 Ham. 90. *Satterlee v. Ten Eyck*, 7 Cow. 480. *Snow v. Conant*, 8 Vt. 308. *Hewitt v. Pigott*, 8 Bing. 61. It is the same rule, under which courts of law protect the rights of the assignee of a *chose* in action.

Here the case shows that Elisha Rix was administrator of George S. Lee's estate, and took said notes of the defendant as *such administrator*; the notes show, upon their face, *the interest of the estate*; and *notice to the defendant* of this interest, is proved by their form, as well as by his own testimony. And that those in-

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terested in the estate of Lee will suffer injury, by holding the notes to have become absolutely the property of Elisha Rix, is proved by the fact of the *insolvency* of his estate.

But the notes did not, *as against the heirs of Lee's estate*, become the property of Elisha Rix. They were yet *equitably*, assets of the estate, even if it be true, that they could be sued only in the name of Elisha Rix, or his administrator. *Harbin & Levi*, 6 Ala. 399. *Baxter v. Buck*, 10 Vt. 548. *Adams v. Campbell*, 4 Vt. 447. *Wheelock v. Wheelock*, 5 Vt. 439.

The plaintiff, under the rule adopted in this state, might have sustained this suit as administrator *de bonis non* of George S. Lee, as well as in his character of administrator of Elisha Rix. In *R. & B. Railroad Co. v. Cole*, 24 Vt. 39, the plaintiffs were allowed to recover upon a note payable to "*Samuel Henshaw, Treasurer, &c.*," and it was said by the court to be now the settled law of this state, that the person beneficially interested may sue upon simple contract; and that the case of *Arlington v. Hinds*, 1 D. Chip. 431, puts promissory notes on the same ground.

It was the duty of the administrator to loan the money, *so that it might draw interest*; and his omission to do so would have made him chargeable for the interest, which might have been obtained. *Admr. of Eames v. Crs. of Eames*, 4 Vt. 264.

There is no difference, in principle, between the case of a promissory note made payable to the administrator, and a judgment recovered by him as such. They are each new contracts, which, at common law, must be enforced in his name, and not as administrator. And the statute of this state, (Comp. Stat. Chapt. 50 § 16,) which authorizes the administrator *de bonis non* to enforce such judgments, shows the policy of the law. The rule of decision in this state, based upon the decision in *Arlington v. Hinds*, renders such a statute unnecessary in the case of notes.

J. S. Marcy for defendant.

The plaintiff sues in the capacity of administrator of Elisha Rix, and not as administrator *de bonis non* of Lee's estate. This was proper, only because the demands sued were Elisha Rix's own contracts and property.

Elisha Rix had not only the legal interest, but the entire and exclusive ownership of the notes; Lee could not by any legal pos-

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sibility ever have had any title to, or interest in them. They were not in existence until he ceased to exist, and it follows that his heirs or creditors could have no interest in them.

If it were apparent, that property or money belonging to Lee's estate was the consideration of the notes, it would by no means follow that the notes were assets, indeed they could not be; they are contracts between Elisha Rix and the defendant; and if the consideration was the property of Lee's estate, Elisha Rix, and his bail after him, is liable to Lee's estate for the same. Elisha Rix had fully administered on that property, the moment he exchanged it for the notes, if he did so, and became accountable to the estate for it, at all events; he could not receive notes for it, at the risk of the estate. That was not within his fiduciary authority. Can an administrator *virtute officii* traffic in the assets, on account of, and at the hazard of the heirs or creditors of the estate? If not, securities taken on the sale of them cannot be assets. Then Elisha Rix became accountable to Lee's estate, for the money or property exchanged for the notes, and it is preposterous to say that the estate owns the notes. *Nason v. Potter*, 6 Vt. 28. Hammond on Parties 115, 1 U. S. Dig. 804 § 814, 815, refers to 3 Iredell's North Carolina Rep. 268. *Higler v. Smith*, 1 D. Chip. 409. *Eccr. of Bolton v. Admr. of Martin*, Brayton 108. *Wheelock v. Wheelock*, 5 Vt. 439. 2 U. S. Dig. 768 § 187—refers to 7 Missouri Rep. 351.

In the case of *Arlington v. Hinds*, 1 D. Chip. 481, it is held that courts of common law have, independent of statutes, equitable jurisdiction to offset judgments; and the offset, in the present case, was properly made under the motion.

An application, to offset judgments, is addressed to the discretion of the court, and their decision cannot be revised by the upper court, except in cases where it operates flagrant injustice. 2 Aik. 225.

That the judgment offset was rendered after this suit was brought, is no objection against offset on motion, though it might be, upon plea. It was predicated and rendered on pre-existing debts, and does not extinguish the debts, but renders their justness more certain. 2 U. S. Dig. 758 § 21. *Conable v. Bucklin*, 2 Aik. 221.

Debts accruing after action brought may be offset. 3 U. S. Dig.

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425 § 235; and so may a note against an insolvent intestate, *becoming due* after action brought by the administrator. 2 U. S. Dig. 762 § 125.

(Those parts of the plaintiff's and defendant's brief, touching the admissibility of the testimony, are omitted, as the court do not pass upon that question.)

The opinion of the court was delivered by

ISHAM, J. The judgment in this case was rendered on two promissory notes, payable to Elisha Rix as administrator of the estate of George S. Lee. Elisha Rix has deceased, and the plaintiff is the administrator *de bonis non* of the estate of George S. Lee, and the administrator also, of the estate of Elisha Rix; and as administrator of Elisha Rix, has prosecuted these notes, and recovered this judgment; thus treating them as assets, and as the property of that estate. The notes are merged in the judgment, and the defendant is now indebted upon that matter, only to the estate of Elisha Rix.

The defendant has a claim against the estate of Elisha Rix, which was allowed to him by the commissioners on that estate, and which is perfected as a judgment, by being allowed and recorded in the probate court. Claims of that character are treated as judgments, except they cannot be enforced by the final process of execution. These judgments are therefore mutual in their character, and if they were judgments in the same court, the set off of one judgment against the other would be a matter of legal duty, as well as of equitable right. Comp. Stat. 283 § 12. The judgments, not being in the same court, an offset cannot be directed under the provisions of the statute. It is, therefore, to the equitable power of this court, which it exercises independently of the statute, that this application is made. The power to direct such an offset, and the duty of the court so to do, as a general rule, has not been questioned. It is fully sustained and enforced by the case of *Cowable v. Bucklin*, 2 Aik. 221.

As these judgments are mutual, and as an offset would be a matter of right, if they were judgments in the same court, it would seem to be a duty equally as imperative and equitable, to exercise that power on this application, that it would be if they were judgments in the same court; for surely, the equity is the same, when

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the judgments are in different courts, that it is when they are in the same court. In making an offset of these judgments, the defendant has only secured to him a right, the exercise of which is prevented, for the want of an opportunity to plead the judgment in offset, and of which the plaintiff may deprive the defendant by enforcing payment of his judgment by execution, unless a power of this kind is exercised. In cases of that character, it has been observed, "that the power of setting off judgments, not only of "the same, but of different courts, does not depend upon the "statute of offsets, but upon the general jurisdiction of the court "over its suitors, and that it is an equitable jurisdiction, and frequently exercised." *Simpson v. Hart*, 1 Johns. Ch. 91. *Montague on set off*, 7. *Baker v. Braham*, 2 Black. R. 869.

It is insisted, that this application should not be allowed, as it may unjustly effect the estate of George S. Lee, and divert therefrom the amount of these notes, which were given, and should be held as assets of that estate. It would seem, from the face of the notes, that their consideration proceeded from the estate of George S. Lee, and they undoubtedly would be evidence of that fact, as between the estate of George S. Lee and Elisha Rix as administrator on his estate. It is upon this consideration alone, that Elisha Rix in his life time could have sustained an action on these notes as administrator. This he might have done, and for the same reason, the plaintiff, as the administrator *de bonis non* on the estate of George S. Lee, might have prosecuted these notes, "for where "the cause of action is such, that the first administrator may sue "in his representative capacity, the right of action devolves upon "the administrator *de bonis non* of the intestate." This seems to be the doctrine as settled by later authorities, though the rule, formerly, was held otherwise. *Catherwood v. Chabald*, 1 Barn. & Cress. 150. *Partidge v. Court*, 5 Price 412. But while these notes could have been prosecuted by Elisha Rix as administrator, in his life time, and by the plaintiff as administrator *de bonis non* on the estate of George S. Lee, it was nevertheless competent for Elisha Rix during his life, to consider himself the debtor of that estate for the amount of the notes, and to hold the notes as his own. That liability was imposed upon him, and which he assumed when he parted with the property, or money of the estate of George S. Lee, and took these notes. From that time, he was the debtor

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to the estate of George S. Lee, to the amount of those notes. In consequence of that indebtedness, he might have held the notes as his own. He could have indorsed them, and thereby have transferred the legal and equitable interest in them to his indorsee, free from any equity, which the estate of George S. Lee might have in the notes. He could have prosecuted them in his own name, and right, and recovered the amount for his own use. These principles are in conformity with the early decisions on this subject, and they are recognized as existing principles by late authorities. In the case from the 1 Barn. & Cress. 150, ABBOTT, Ch. J., observed: "that there may be cases, where the administrator of an *administrator might and ought to sue*, viz, if the first administrator had made *himself debtor* to the intestate's estate, for the *amount of a bill*, received in payment of a debt due to that estate;"—and BEST, J., observed, "that this observation may serve to reconcile the various cases which have been referred to." If Elisha Rix, during his life, had commenced a suit on these notes in his own name and right, he would not have been a mere nominal party on the record, nor would he have been prosecuting the notes as trustee, having the estate of George S. Lee, as *cestui que trust*; but he would have stood as the holder and owner of the notes, having, in consequence of his indebtedness to the estate of George S. Lee, for their amount, the legal, equitable and beneficial interest in them; and the estate of George S. Lee, for the payment of their claim, must look to the estate of Elisha Rix and his administration bond. If Elisha Rix could have sustained an action on these notes in his own name and right, the plaintiff as his administrator, can prosecute them in the same right, for he succeeds to all the rights which the intestate had. In the commencement of this suit by the plaintiff as administrator of Elisha Rix, and in its prosecution to final judgment, he has treated this claim as assets, and as the property of the estate of Elisha Rix, and subjected the same to every legal and equitable offset, which the defendant has against him or his estate. Under these circumstances, it is not for this plaintiff, as administrator *de bonis non* on the estate of George S. Lee, to object, nor for this court to refer the offset of one judgment against the other, where they are rendered mutual in their character, by the act of the parties, to the same extent as if they were judgments in the same court.

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It becomes unnecessary to say anything in relation to the admissibility of the parol testimony offered and admitted by the court; for if the testimony is admissible, the equity, in the offset of these judgments, is apparent. If the testimony is held inadmissible, in the view we have taken of the case, it will not alter the result.

The judgment of the County Court, allowing the offset, must be affirmed.

LEWIS ROBINSON v. ASA MORSE.

Pleading. Arbitration and Award.

Where the submission is by deed under seal, and an award is made in pursuance to the submission, the award is a bar to any suit afterwards brought on notes or other matters, intentionally withheld from the examination and decision of the arbitrators, if they were included in the submission.

Quaero—Whether, under the same state of facts, an award on a parol submission would not have the same effect.

But if the omission to present the notes or other matters to the arbitrators, arose from any mistake, forgetfulness, or accident, &c, then the matter may be replied to the plea in bar, and the question directly presented whether under any of these circumstances, the award will be a bar to a suit for the recovery of claims so omitted in the award.

ASSUMPSIT on two promissory notes. The defendant pleaded the general issue, and two special pleas in bar; the defendant in the special pleas set forth a submission in writing under the seals of the parties to arbitration, of all matters in dispute between the parties, including the notes in question, and an award made in pursuance of said submission.

The plaintiff replied, and set forth in his replication, that said notes, in the declaration mentioned and counted upon, were never presented to, or considered by said arbitrators.

To the plaintiff's replication the defendant demurred.

The County Court, December Term 1853,—COLLAMER, J.,

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presiding,—adjudged the replication insufficient, and rendered judgment for the defendant.

Exceptions by plaintiff.

S. Fullam for plaintiff.

The only question raised in this case, is, whether the submission and award were of such a character, as to bar a recovery on the notes, when they were not presented to the arbitrators or adjudicated by them.

The plaintiff insists that a recovery on the notes is not barred, for this proceeding cannot have more force than a proceeding at law. *Whitmore v. Whitmore*, 2 N. H. 29.

A former adjudication in a court of law, where the matter might have been adjudicated but was not, is not a bar to a recovery. *McLaughlin v. Hill*, 2 Vt. 20.

And the law is the same in relation to arbitrations. *Whitmore v. Whitmore*, before cited. *Buck v. Buck*, 2 Vt. 417. *Rover v. Farmer*, 4 Term 146. *Golightly v. Jellicoe*, note a, 4 Term 146. *Webster v. Lee*, 5 Mass. 234.

The case of *Smith v. Johnson*, 15 East. 213, does not militate against the doctrine.

Converse & Barrett for defendant.

By the pleadings it is conceded, on the part of the plaintiff, that the notes in suit constituted a part of the deal and subject matter of dispute between the parties, submitted by the mutual agreement of the parties under seal; and that the arbitrators, made their award under, and in pursuance of said submission.

It is conceded on the part of the defendant that said notes were not presented to, nor considered by the arbitrators in making their award.

Upon this state of the case, the question is, whether this suit is barred by the submission and award. The law of the case is established in *Smith v. Johnson*, 15 East. 213. *Dunn v. Murray*, 17 E. C. L. 498. 30 E. C. L. 405. *Wheeler v. Van Houten*, 12 Johns. 311. *Fidler v. Cooper*, 19 Wend. 285. *Warfield v. Holbrook*, 20 Pick. 531.

The case of *Buck v. Buck*, 2 Vt. 417, extends only to submissions not in writing. The judge giving the opinion says, "we

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are not at present inclined to open the door to go back of *written* submissions and references that are general, and the awards general."

Briggs v. Brewster, 23 Vt. 100, involved an item *not embraced in the submission*—of course not concluded by the award. The remarks of REDFIELD, J., upon the law of the subject generally, indicated that in this case, the plaintiff might be regarded as estopped to sue on the notes. It is claimed by defendant, that the plaintiff is indeed so estopped, if there is any form of authority in the cases from Westminster Hall, or from the courts of New York and Massachusetts.

The case of *Wheeler v. Van Houten*, *ubi supra*, puts the doctrine on its true ground, as between the effect of a judgment and an award. (See last clause of opinion of court.)

The case of *Rover v. Farmer*, 4 Term 146, and *Golightly v. Jellicoe*, cited in the note are not in opposition to the other cases. See remarks of BRONSON, J., in 19 Wend. 288. Also 15 East. 213, and *Wheeler v. Van Houten*.

The opinion of the court was delivered by

ISHAM, J. The questions in this case arise upon a general demurrer to two special pleas in bar; in each of which the defendant has pleaded a submission to arbitration of all matters in dispute between them, and award of the arbitrators made in pursuance of that submission. The replication admits the submission and award as stated in the pleas; and the demurrer to the replication admits, that the notes mentioned in the declaration, were not presented to, or adjudicated by the arbitrators, in making their award. In the second plea, it is stated that a controversy had arisen between these parties concerning their book accounts, and that other matters of dealing and dispute existed between them, and for the purpose of adjusting the matters in controversy, the parties, by their mutual agreement in writing, under their hands and seals, agreed to submit the same to arbitration. This plea contains the averment, that the notes described in the declaration were a part of the matters in dispute, and in controversy, and that on the 8th day of December, 1851, the arbitrators made and delivered their award, in pursuance of that submission. The question arises, whether that submission and award is a bar to a recovery on these

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notes, when they were not included in the award, and were not the subjects of investigation by the arbitrators.

It sufficiently appears from the averment, in this plea, that the notes were included in the submission, as being matters in dispute and controversy between the parties, and might have been settled in the award of the arbitrators, if they had been presented for that purpose. The averment of that fact, and the admission of its truth by the demurrer, becomes material, as otherwise, from the cases of *Rover v. Farmer*, 4 Term 146, and *Wheeler v. Van Houten*, 12 Johns. 311, it would seem that the notes were not submitted, and consequently, that the award would be no bar to a recovery on the notes. The notes in this case being included in the submission of the parties, as matters then in controversy between them, the authorities fully establish the principle, that where the submission is by deed, an award made in pursuance of it will be a bar to any action brought for the recovery of any matters that were included in the submission. In Russell's Arbitrator 389, it is said, "that after an award had been made, no action can be maintained for any matter in difference within the scope of the submission, though it were not in fact brought before the arbitrator. Parties, therefore, must be careful to bring forward at the time of the reference, every claim within the submission on which they intend to insist." This rule is sustained by the case of *Smith v. Johnson*, 15 East. 213, and by the case of *Dunn v. Murray*, 9 Barn. & Cress. 780. The same rule has been adopted in New York in the cases of *Wheeler v. Van Houten*, 12 Johns. 311, and *Fidler v. Cooper*, 19 Wend. 285. In the last case the court remarked, "that the rule may sometimes operate harshly, but it is nevertheless a salutary principle from which we cannot depart, without the danger of defeating the beneficial ends intended to be answered by allowing parties to submit their controversies to judges of their own selection." The same principle is recognized in Connecticut in the case of *Bunnell v. Pinto*, 2 Conn. 431, and Massachusetts in the case of *Warfield v. Holbrook*, 20 Pick. 534.

It is to be observed, that there is no pretense in the case, that the omission to present these notes to the arbitrators, arose from any mistake, forgetfulness or accident, or that the arbitrators refused to render their award upon any matters submitted to them. If that had been the case, the matter might have been replied,

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and the question directly presented, whether under these circumstances, the award would be a good bar to a suit for the recovery of the claims so omitted in the award. 1 Barn. & Adol. 723. 2 Adol. & Ellis 752. But as the case now stands, no such questions are presented. It is the simple case of a submission of these notes, with other claims, as matters of dispute, under the hands and seals of these parties, to arbitration; an award made in pursuance of that submission, and an intentional withholding of these notes from the examination and decision of the arbitrators. Under such circumstances the award is clearly a bar to this suit. Whether this principle would apply in cases of a parol submission, we are not called upon to decide. It was so applied in *Wheeler v. Van Houten*, 12 Johns. 311; but a different rule was adopted in the case of *Buck v. Buck*, 2 Vt. 417; though the rule in that case was strictly confined to parol submissions; the court observing, "that they were not inclined to open the door to go back of written submissions, that are general, and the awards general."

In cases of judgments at law, they are a bar only to matters actually adjudicated and determined, and will be no bar to a distinct cause of action not investigated. In those cases, the party is under no obligation to unite distinct causes of actions in his declaration, or present them for determination. But where an obligation of that kind exists, as it does where the parties have agreed under hand and seal to submit the matters, then the adjudication or award, becomes conclusive, and is a bar to any matter, which they have agreed to, and which is included within the submission.

The judgment of the County Court is affirmed.

Downer v. Rowell.

SOLOMON DOWNER v. CHRISTOPHER C. ROWELL.

Debt on judgment. Pleading. Bankruptcy.

If the replication to a plea, contain more than one answer, and tenders several and distinct issues, which will necessarily lead to several traverses, the replication is defective on special demurrer.

And though a party, in answer to a plea in bankruptcy, is not confined to a technical replication, but may under the 4th section of the bankrupt act give the defendant written notice, specifying the fraudulent act and concealment; still, if the party adopts the form of a special replication, thereby calling for a rejoinder and special traverse, it must be single in its character, or the defect will be reached by a demurrer.

It is now settled law in this state, that a certificate obtained by a bankrupt, under the act of Congress of 1841, is a bar to an action upon a judgment, recovered pending the proceedings in bankruptcy, and before the granting of the certificate, upon a debt due at the time of the decree of bankruptcy; and the costs, accruing upon the debt after the decree and before the granting of the certificate, follow the debt, in this respect. See *Harrington v. McNaughton*, 20 Vt. 293.

DEBT on judgment. The defendant pleaded a discharge in bankruptcy, under the act of Congress of 1841; to which the plaintiff replied setting forth various and distinct acts of fraud, in avoidance of the discharge in bankruptcy. To the replication the defendant demurred specially.

The County Court, December Term, 1853,—COLLAMER, J. presiding,—adjudged the replication insufficient, and rendered judgment for the defendant.

Exceptions by plaintiff.

W. C. French and Washburn & Marsh for plaintiff.

I. It is conceded, that in *Harrington v. McNaughton*, 20 Vt. 293, this question was decided adversely to the plaintiff's claim; but it is believed, that there is sufficient importance to the question and the case, and sufficient reasons shown by the adverse decisions of other courts, which were not brought to the notice of the court in that case, to justify the court in again examining the question.

The counsel cited in argument on this point—*Green v. Sarmiento*, 1 Pet. C. C. 74. *Sampson v. Clark*, 2 Cush. 173. *Woodbury*

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v. *Perkins*, 5 Cush. 86. *Holbrook v. Foss*, 27 Maine 441. *Fisher v. Foss*, 80 Maine 459. *Pike v. McDonald*, 82 Maine 418. *Todd v. Maxfield*, 6 B. & C. 106. The counsel also claimed that the decision in *Harrington v. McNaughton* was at variance with the principle adopted in *Sawyer v. Vilas*, 19 Vt. 43. *Compstock v. Grant*, 17 Vt. 512.

II. The replication is not open to the objection of duplicity.

It is not a technical replication, at common law, but is filed, as an answer to the plea, under section 4, of the bankrupt act.

Its formal commencement and conclusion do not divest it of this character. Its *gist* is the allegation of fraud and wilful concealment of property, and the particular acts relied upon are properly stated as a specification, within the statute, under this general allegation, and it is admissible to state each act, both as a substantive ground for impeachment of the certificate, and as tending to show the fraudulent *intent*, with which each other act alleged was committed. *Chadwick v. Sturrett*, 27 Maine 143. *Outler v. Taylor*, 1 Sandf. Sup. Ct. 593. *Dresser v. Brooks*, 3 Barb. Sup. Ct. 42. *Swan v. Littlefield*, 4 Cush. 574. *Beekman v. Wilson*, 9 Met. 434. *Hubbell v. Cramp*, 11 Paige 310.

III. But the replication is sufficient at common law. It alleges *fraud* in the procurement of the discharge; and this presents a single, certain and determinate issue. But to plead *fraud* merely, without more, would be faulty; for it would be pleading a legal conclusion. Hence it becomes necessary and proper, to specify, under the general allegation, all those acts, which prove the guilty purpose.

Converse & Barrett for defendant.

If the plaintiff's allegations of fraud are to be regarded as technically a *replication*, the demurrer must prevail.

It is in *terms* and *form* a replication. Its technical character and incidents must adhere to it, unless the bankrupt law *forcibly* divest it of *them*. The only thing in that law relating to the subject is in section 4, "and such discharge and certificate, when duly granted shall in all courts of justice be deemed &c., unless the same shall be impeached &c., on prior reasonable notice specifying in writing such fraud and concealment."

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A technical replication is known and used only where the common law system of special pleading prevails.

In Vermont and New York and some other states, the giving notice of special matter was allowable only in certain cases by the *defendant under the general issue*.

The giving notice of special matter under a general answer to a special plea is a thing unheard of in Vermont, or in any other state using the common law system of pleading.

It must be conceded, that it is competent under the act to reply fraud by a technical replication in this state. The most that can be claimed is, that it was optional with plaintiff to reply in this manner, or to give notice informally.

It is settled that defendant should *plead* the discharge—having so done, the subsequent proceedings must go along in the established course, 3 Johns. 315.

But again,—If the bankrupt act requires merely *notice*, and excludes the use of a technical replication, then clearly the plaintiff's pleading is obnoxious to our demurrer; for he has transgressed the law in using a mode of procedure which the law itself excludes.

The counsel further discussed this branch of the case at length. And in support of the defense set up in the case cited, *Harrington v. McNaughton*, 20 Vt. 293. *Spaulding v. Dixon*, 21 Vt. 45. *Ollcot v. Avery*, 1 Barb. Ch. 347. *Johnson v. Fitzhugh*, 3 Barb. Ch. cited in 9 U. S. Dig. 65 § 22. *Drew v. Brooks*, 3 Barb. Sup. Ct. cited in 9 U. S. Dig. 66 § 22, 9 U. S. Dig. 66 § 24. *Fox v. Woodruff*, 9 Barb. Sup. Ct. 498. *Rogers v. Western Ins. Co.*, 1 La. 161. *Francis v. Ogden*, New Jer. 210, cited in 12 U. S. Dig. 81 § 29.

The opinion of the court was delivered by

ISHAM, J. To this declaration in debt on judgment, the defendant has pleaded a discharge under the late bankrupt act. If the answer to the plea is to be regarded as a technical replication, it is manifestly defective under this demurrer; as being double, and containing several distinct and independent matters, each of which constitutes a sufficient answer to the plea. This is not permitted in a replication. The defendant may plead several pleas, each of which may contain distinct matters of defence; but the replication

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to each of the pleas must be single, and contain only one answer to the same plea. Chitty on Plea. 641.

The plea in this case was fully answered and avoided, by setting forth in the replication the conveyance to David and Hiram Moore, if that conveyance was fraudulent. This it was proper to reply, and state such facts as would show the conveyance to be fraudulent, as they would make but one connected proposition. Chitty on Plea. 641. 1 Burr. 817. But when in addition to the statement of that conveyance, the party sets up other conveyances as fraudulent, made to other persons, and of other property, the replication contains more than one answer to the plea, and tenders several and distinct issues, which must necessarily lead to several traverses. In such case, the replication is defective on special demurrer.

It is insisted, however, that under the 4th section of the bankrupt act, it is not necessary that a technical replication should be filed in answer to such a plea, and that it is sufficient to give the defendant a written notice specifying the fraudulent act and concealment upon which the party relies, to avoid the effect of the plea. It is also insisted, that if this replication is defective on demurrer, it is good as a written notice under the statute; and that under a notice of that character several distinct acts of fraud may be stated and proved on the trial of the case. It is probably true, and such we think is the proper construction of the act, that the plaintiff may adopt either of those methods, and may set up this matter in avoidance of the plea by a replication, or by a notice under the statute, at his election. If he elects to give a written notice, he may state the different acts of fraud, which exist in the case, and prove them on the trial, though they are distinct and independent in their character. But if he adopts the form of a special replication, thereby calling for a rejoinder, and a special traverse, it must be single in its character, or the defect will be reached by a demurrer. This replication, we think, is defective in this particular.

In relation to the defense set up in the plea, we think that matter must be considered as settled in this state by the decision of this court in the case of *Harrington v. McNaughton*, 20 Vt. 293. In that case it was held, that the certificate of a bankrupt is a bar to an action upon a judgment recovered pending the proceedings

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in bankruptcy, and before the granting of the certificate, where the debt upon which the judgment was rendered, was due at the time of the decree in bankruptcy. These are the facts set up in this plea and are admitted by the demurrer. The judgment, therefore, upon which the plaintiff has declared, must be considered as barred by this certificate.

We are aware that a different rule has been adopted in some of the other states. *Woodbury v. Perkins*, 5 Cush. 86. *Pike v. McDonald*, 32 Maine 418, and in other cases which have been referred to; while other states have applied the rule adopted in the case from 20 Vt. 298; *Spaulding v. Dixon*, 21 Vt. 45. *Fox v. Woodruff*, 9 Barb. S. C. R. 498. *Clark v. Rowling*, 8 Compt. 216.

The decisions in different states are in conflict with each other on this question, and as the matter has been investigated and decided in this state, we must regard the subject as not open for further consideration.

The judgment of the County Court is affirmed.

BRIDGMAN HAPGOOD v. AARON GODDARD.*Petition to set aside an execution.*

In a trustee process, the case is not ended as to the principal defendant, until the case is disposed of as to the trustee; and strictly speaking the plaintiff would not be entitled to an execution, till the day following the final determination of the whole case.

If an execution irregularly issues and a party desires to have the same set aside, he must apply in a reasonable time, which is the earliest convenient time.

Courts of law, ordinarily refuse to set aside executions, when that and that only has been done, which is required to be done now, although done prematurely.

THIS was a petition to set aside an execution.

The petition set forth in substance, that on or about the twenty first day of April, 1848, one Aaron Goddard of Reading, commenced a suit against the petitioner by the trustee process, summoning Timothy P. Collins, Joel Holden, Nathan Weston, and others, as trustees.

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That said suit was made returnable to the November Term, 1843, of the county court, and was duly entered in said court, and that a judgment by default against the petitioner, was duly entered at the May Term, 1844, of said court, for the sum of \$768,07, damages, and the sum of \$20,17, costs, in and about said suit.

That said trustees appeared, and made disclosure, &c., and such proceedings were had that, as to the said Collins, and one Levi Slack and Jared Marsh, by the consideration of the Supreme Court at the March Term, 1853, a final judgment or judgments were therein rendered, by which the said Slack and Marsh were discharged from all claim of the said Goddard, as such trustees, and said Collins was adjudged trustee for the sum of \$208,86. (*See Goddard v. Hapgood & Trustees*, 25 Vt. 351.)

That Nathan Weston, Michael L. Weston, and Elbridge Hapgood, at the November Term, 1845, of the county court, were duly discharged, as such trustees, and that said Joel Holden departed this life about the first of June, 1850, intestate.

That on the tenth day of June, 1844, and long before final judgment was rendered in said suit as to said trustees, the said Goddard took out a writ of execution, from the said county court signed by said clerk, against the petitioner for said sum of \$768,07, damages, and \$20,17, as costs of suit, and twenty-five cents for said writ of execution; that said execution was in all respects in the common form, and was returnable in sixty days from its date, and purported to be issued upon a judgment rendered by said county court, May Term, 1844.

All which, by the files and records now remaining in said county Court, and in the Supreme Court, fully appears.

That said Goddard, on or about the first day of August, 1844, caused to be seized by virtue of said writ of execution, a large amount of personal property of the petitioner, and afterwards caused the same property to be sold. In all which great injustice and great injury was done the undersigned.

That said Goddard was not by law entitled to a writ of execution against the petitioner, until final judgment in said suit with reference to said trustees; and that the same was unlawfully, irregularly, and improperly issued by said clerk, and taken out by said Goddard, and that the same ought to be set aside and held for naught.

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The petitioner, therefore, prays the Hon. Court to vacate, annul and set aside said writ of execution, and for other relief in the premises, &c.

The County Court, December Term, 1853,—COLLAMER, J., presiding,—found the facts stated in the petition to be true. They also found that the property levied upon by virtue of said execution, was taken from the possession of said Collins, to whom, (with one Holden since deceased) the same had before been assigned by said Hapgood, for the benefit of his creditors; that the county court, at their May Term, 1852, decided that the said Collins was chargeable as trustee for the amount thus levied upon by virtue of said execution, but the Supreme Court, contrary to the desire or request of said Collins, reversed that part of the judgment of the county court, and made said Collins chargeable only for the balance of the property in his hands, deducting the amount thus levied upon.

The court also find, that soon after said property was taken on said execution a suit was brought therefor by said Collins, which suit is still pending and considerable expense and a large bill of costs incurred by said Collins therein, for which he has never been remunerated, and has no means of indemnity.

Upon the foregoing facts, the court decided that said petition could not be sustained, and dismissed the same.

Exceptions by petitioner.

Washburn & Marsh and Converse & Barrett for petitioner.

It is insisted that the taking out the execution against the principal defendant, before final judgment in the suit as against the trustees, was *irregular* and may be avoided upon proper application.

The point was expressly raised and decided in *Jones v. Spear*, 21 Vt. 426.

According to the ruling of the court in that case, the obtaining judgment against Hapgood, did not put an end to the suit even as against him, until the whole case was disposed of as against the trustees. See opinion of court page 480. And see the analogous cases of *Downer v. Dana et al.*, 22 Vt. 22. *Hayes v. Stewart & Trustees*, 20 Vt. 652.

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Where goods are seized in execution, the judgment is satisfied if the officer misapply the goods. *Ladd v. Blunt*, 4 Mass. 402.

If one is declared a trustee on account of goods or chattles in his hands other than money, a proceeding is to be had to ascertain its value, &c. Comp. Stat. 259 § 27, 38.

If a trustee is made liable for money due presently, execution is to issue for the same, and the amount certified on execution against principal debtor. Comp. Stat. 262 § 44.

The judgment then against the trustee, is a final and conclusive judgment and merges the original cause of action.

S. Fullam for petitionee.

The petitioner is not entitled to the relief sought.

The execution which is sought to be set aside, issued nearly ten years ago, and was returned satisfied in part more than nine years ago.

The trustees have been discharged for the amount of property taken from them on the execution, and this proceeding is to enable them to obtain the property.

The execution issued legally. *Spring v. Ayer & Trustees*, 23 Vt. 516.

If any reason ever existed for setting aside the execution an acquiescence of nine or ten years would fully remove that reason.

The opinion of the court was delivered by

REDFIELD, Ch. J. The execution, in this case, according to the views expressed, in the reported cases upon the subject, referred to in argument, may probably be regarded as having issued prematurely, and so far irregularly. The cases referred to did not absolutely require a decision to this extent, in order to their determination. But the case of *Jones v. Spear*, 21 Vt. 426, is put upon this ground. And it is no doubt true, that strictly speaking, the party would not be entitled to an execution, till the day following the final determination of the whole case. Whether the court might not allow it to issue, under some circumstances, at an earlier day, after the judgment was perfected, and no exceptions taken, as to the principal debtor, it is not needful to consider now. This execution does not appear to have so issued.

But if the party was allowed to have it set aside upon motion,

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he should show two things, diligence and danger of being unjustly affected by the execution. In the present case both these matters are wanting. The party should have applied in a reasonable time, which is the earliest convenient time. Nothing appears in the present case, why the application should not have been made, at the first term after the levy, and it was not, in fact, made till some eight or nine years after.

And instead of the party being in danger of suffering injustice, by the execution not being set aside, it would seem, that the other party may be exposed to such consequences, if that is done, at this late day. In this very case, this court held the trustee not liable for this property, because it had been taken out of his hands, by this very execution, and this, notwithstanding the question of its validity was fully discussed before the court, and among other reasons, upon the ground that it had been too long acquiesced in by the petitioner, to be now regarded as inoperative. If it should now, be set aside, it would exhibit this absurd anomaly, that, although it might be a justification to the officer and the party, for the acts done under it, it would probably expose the party, to be compelled to refund the money collected upon it, and at the same time not be able to obtain it of the trustee, who has been discharged, on grounds before stated. We should certainly be unwilling to impose such injustice upon the parties, by such inconsistent decisions in the same case, even if there were doubt about the perfect soundness of the former determination. But we have no doubt of its soundness, and should unhesitatingly make it now, if the matter were entirely *res integra*.

What has been said of Hapgood's liability, to pay this debt twice rests in mere possibility, when if he does, he will have ample remedy probably at law, and certainly in equity. And arguments *ab inconvenienti* are unsatisfactory always, and where they rest in mere possibility or conjecture, and when, if they are allowed, the certain and immediate result is, injury to others, are of no significance.' Under such circumstances it will be time for the party to complain when the injury occurs. Ordinarily courts of law refuse to set aside executions, when that, and that only, has been done, which is required to be done now, although done prematurely.

Judgment affirmed.

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LUTHER HAMMOND v. CLARK CHAMBERLIN.

Guarantor. Evidence. Subrogation.

Where the defendant sold and transferred to the plaintiff a promissory note made in the usual form, and placed upon the back of the note the following guaranty, "I hereby guarantee this note good until January 1, 1860—*Held*—that the contract of the defendant was collateral, and not absolute, and that by this guaranty he agreed, that during the period mentioned in the guaranty, the makers of the note should be in that condition, that payment of the note could be enforced against them, if legal diligence was used for that purpose.

And on such a guaranty the defendant is not liable as indorsor, nor is he liable on an absolute engagement to pay the note on the first day of January, 1860, if the makers fail to pay it; and the written guaranty is not admissible as evidence under a count against the defendant as indorsor, nor under one on absolute engagement to pay the note on the first day of January, 1860.

The evidence showed, that the makers of the note before and on the first day of January, 1860, were not only the owners, but were in the open and visible possession of property more than sufficient to pay the note, under this proof *it was held*, that there was no breach of the guaranty, and that the note was good within the meaning and terms of the guaranty.

In this case, the plaintiff commenced an action against the makers of the note, and the sheriff, who served the writ attached property and took a receipt from the makers of the note and one other, and in consequence of his liability, growing out of the insolvency and failure of his receiptors, he paid the debt to the plaintiff—*Held*—that in such a case, the sheriff is not entitled by subrogation to the right and remedy of the plaintiff against the defendant on the guaranty, as this right of subrogation exists only against the makers of the note.

The payment, by the sheriff in such a case, will inure to the benefit of the guarantor.

ASSUMPSIT in four counts; in the *first* count, the plaintiff set forth in substance, that at Barnard on the first day of April, 1846, Daniel and Hiram Aikens, by their promissory note of that date, for value, promised the defendant to pay him or order the sum of \$200, on demand and interest annually, and afterwards, to wit, at Barnard, on the first day of January, 1847, the defendant indorsed said note to the plaintiff, and that plaintiff on the day last aforesaid, presented said note to the said Daniel and Hiram Aikens, that they neglected and refused to pay the same, whereof the defendant had notice, and became liable to plaintiff, &c.

The *second* count sets forth, "that the said Daniel and Hiram

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Aiken, at said, Barnard, on the first day of April, 1846, by their certain other promissory notes in writing by them signed, for value &c. promised the defendant to pay him or order the sum of \$200, on demand and interest, and the defendant, afterwards, to wit, on the first day of January, 1847, said note being unpaid, requested the plaintiff to purchase said note, and to induce the plaintiff to become the purchaser of said note, he, the defendant by his indorsement in writing on the back of said note, ordered the same to be paid to the plaintiff agreeably to its tenor, and thereby further undertook and promised the plaintiff that the said note should be paid by the first of January, 1850, and the plaintiff avers that confiding, &c.'

The *third* count sets forth, "that the defendant, at said Barnard, on the first day of January, 1847, in consideration that plaintiff at the special instance and request of the defendant, would purchase of him a certain other promissory note, dated the first day of April, 1846, payable to the said defendant or his order on demand and the interest annually, for the sum of \$200, signed by Daniel and Hiram Aikens, which note was then due and payable, faithfully undertook and promised the plaintiff that the said makers of said note were good and responsible for the amount of said note, and should so remain and be, till the first day of January, 1850, and that said note and the payment thereof could be enforced and collected of them at any and all times up to said first of January, 1850, and the plaintiff avers that relying on said promise and undertaking of the defendant, he did then and there, to wit, on said first day of January, 1847, purchase &c." The count also contains an averment, that the makers of said note, were not good and responsible for said note, and did not so remain at and till the times by the defendant promised, but became, and were long before said first day of January, 1850, to wit, on said first day of January, 1847, poor, irresponsible and destitute of property and ever since have so remained and still are, and that plaintiff has taken all due and lawful means to make collection, &c. of all which defendant has had due notice, whereby the defendant has become liable, &c.

The *fourth* count sets forth, "that the said defendant at said Barnard, on the first day of January, 1847, in consideration that the plaintiff at the special instance and request of the defendant,

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would purchase of him a certain other note dated the first day of April, 1846, for the sum of \$200, signed by Daniel and Hiram Aikens, payable to defendant or his order on demand and interest annually, indorsed upon the said note the words following: "I hereby guarantee this note good until January 1, 1850," and there-to signed his, the defendant's name, thereby undertaking and promising to the plaintiff that said note was good and should remain collectable as against the said signers thereof till said first day of January, 1850. The count also contained an averment that plaintiff, relying on said guarantee, purchased said note, and also that said note did not remain good and collectable, but that the said makers long before the said first of January, 1850, became poor, &c.

Plea, *non assumpsit*, and trial by jury.

The plaintiff, on the trial, offered the note and indorsements, of which the following is a copy:

"BARNARD, April 1st, 1846.

"For value received of Clark Chamberlin, I promise to pay him or his order, two hundred dollars on demand, and the interest annually." (Signed,) DANIEL AIKENS,

HIRAM AIKENS, Surety."

(Indorsed,) "I hereby guarantee this note good until January 1, 1850." (Signed,) "C. CHAMBERLIN."

This guarantee indorsed on said note was conceded to have been made by the defendant, on the 12th day of January, 1849, on the occasion of his transferring the same to the plaintiff, for a valuable consideration.

The defendant objected to the admission of said note and guarantee under either count of the declaration; but the court permitted the same to be read to the jury; to which decision the defendant excepted.

It was also conceded, that on the first day of January, 1850, payment was demanded of the makers of said note, and that the same was not paid, and that afterwards, on the same day, notice was given to the defendant, that said note had that day been presented to said makers, and payment demanded and it was not paid, and that the plaintiff looked to defendant for payment of the same.

The plaintiff conceded, that on said first day of January, 1850,

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the makers of said note were the owners of, and in open and visible possession of property real and personal more than sufficient to secure this debt.

The plaintiff offered evidence tending to prove, that before that time several suits had been commenced against said makers of said note, by various creditors, and that the same were served by nominal attachments of personal property and receipts taken by the officer though no property was ever in fact taken and removed, but that the property described in the said returns and receipts would include the property owned and possessed, by said makers of said note, on the first of January, 1850, and that said suits were then pending.

To this testimony the defendant objected, and the same was excluded by the court; to which decision the plaintiff excepted.

It appeared, that on the first day of January, 1850, the plaintiff sued out a writ of attachment, in his behalf, on this note against the makers thereof, and delivered the same for service, the same day to the sheriff, (who had served the attachments and taken the receipts, aforesaid,) and the same was afterwards by him, returned with his return thereon, that he had served the same by attaching certain personal property of the defendant therein named, sufficient to secure said debt. Said sheriff did not in fact take and remove said property, but relied on a receipt for said property signed by the makers of said note and one Gifford. That the action was duly entered in court, and the plaintiff recovered judgment therein, for the amount due on said note, and his costs, and that he duly and seasonably took out execution thereon, and delivered the same to said sheriff to charge said property, and that the sheriff duly and seasonably demanded said property of said receiptors, but the same was not produced to said sheriff or said execution paid; that after the expiration of the life of said execution the plaintiff called on the said sheriff for the payment thereof, who thereupon paid the plaintiff the amount thereof; that afterwards the said sheriff commenced an action on said receipt and recovered judgment thereon, but has been unable to collect the same; the said makers of said note and said Gifford having become insolvent.

The County Court, December Term, 1853,—COLLAMER, J., presiding,—directed the jury to return a verdict for defendant.

Exceptions by plaintiff.

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Converse & Barrett for plaintiff.

I. The first question is, what is the legal character of the defendant's indorsement?

If the defendant is to be regarded an indorser, waiving demand and notice till January 1, 1850, then surely plaintiff is entitled to recover.

The plaintiff insists *such is* the character of the indorsement.

In the case of *Russell v. Buck*, 11 Vt. 166, the court say the paper would have been good evidence against defendant if he had been sued as *indorser*. And BENNETT, J., was of opinion the paper declared on was an *absolute* and not *conditional* guaranty. The words of guaranty, are, "I hereby guarantee to said R. the collection and payment of the above note, on condition he does not call on me till the first of May, 1831." See cases cited by BENNETT, J.

In *Wheeler v. Lewis*, 11 Vt. 265, the guarantee was in these words "which I warrant *good* and *collectable* until the first of July, 1834." The suit was on the guarantee, which was a paper independent of the note and not on its back. The court said that plaintiff, having commenced suit against the maker, showed that he understood he was obliged to, and that he must be bound by it. See also *Foster v. Barney*, 3 Vt. 60, and *Partridge v. Davis*, 20 Vt. 499, and *Sylvester v. Downer*, 18 Vt. 32.

II. This is an absolute engagement that the note should be paid by the first of January, 1850. The engagement that it shall be "*good*" till January 1, 1850, amounts to saying it shall be paid at that time.

Can there be any such thing as a note being "*good*," unless it will insure the pay? The money for the amount, at the time stipulated is what makes it "*good*."

III. If this indorsement is to be regarded as a collateral guarantee of the *goodness* of the maker, it is an engagement that they should be "*good*" January 1, 1850. No proceedings were necessary to *test* their goodness before that time, on the part of the plaintiff.

IV. The court erred in excluding the testimony offered with reference to the maker's responsibility, or erred in their decision of what constituted "*goodness*," within the defendant's undertaking.

Can a person be said to be "*good*" in a legal or commercial

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sense, who is owing much more than he is worth, although he may have property in his hands?

And how could it be said that the makers had *ability to pay this note*, when their property was all attached, on debts, to a much greater amount than its value?

V. The court erred in deciding that because the note could have been collected out of Gifford, the *receiptor*, if pursued with diligence, therefore the *makers* were "good" within the meaning of defendant's undertaking.

It is difficult to see how the fact, that some innocent third person, as receiptor or sheriff, is drawn in by operation of law, and made *responsible* for the debt of a *bankrupt*, makes that bankrupt *good* and *responsible*.

E. Hutchinson for defendant.

The defendant was entitled to the instruction given, (to return a verdict in his favor,) upon various grounds.

I. The written guaranty produced by plaintiff did not support either count of his declaration.

It did not support the first count for the reason, that it is not an *absolute*, but a conditional guaranty—requiring exertions to collect the note of the makers, and notice of failure before suit brought. *Sylvester v. Downer*, 18 Vt. 32.

The case of *Partridge v. Davis*, 20 Vt. 500, relied upon by the plaintiff, is no authority to the contrary; as in that case the guaranty was absolute, not conditional.

For the same reason it did not sustain the second count, which alleges the guaranty to be "that the said note should be paid by the first of January, 1850."

In the *third* count the guaranty is set up in these words, "that the makers of said note were good and responsible for the amount of said note, and should so remain and be, till the first day of January, 1850, and that the said note and payment thereof could be enforced and collected of them at any and all times, up to the said first day of January, 1850."

That is by no means the legal effect of the guaranty given in evidence. *Wheeler v. Lewis*, 11 Vt. 265.

The *fourth* count is liable to the same objections.

II. The makers of the note, (as the case shows,) on the first

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day of January, 1850, owned property which might have been attached, more than sufficient to secure this debt; and so were in *fact good*, even upon the plaintiff's construction of the guaranty. And it could not vary the case, for plaintiff to have shown, (as he offered to,) that the sheriff, who had his writ, had previously made merely nominal attachments, &c. And the testimony was properly excluded.

III. The direction of the court was right, for the additional reason, that the note guarantied by the defendant, was subsequently to said first day of January, 1850, *actually* secured by an attachment and receipt of property of the makers, which proved available to produce satisfaction of the debt to the plaintiff of record.

The guaranty has been fulfilled, upon every construction contended for. The makers of the note were in *fact* "good" on the first day of January, 1850, and if the officer did not get his pay, it is his own fault or misfortune.

But suppose the court should consider the testimony offered, improperly excluded. Although the general rule is, that for such cause, however slight its bearing, a new trial must be granted; yet, if it appear from the whole record, that the excepting party would not be entitled to a judgment, had the testimony been received, this court will not for such cause open the case, but will affirm the judgment. *Morse v. Crawford*, 17 Vt. 499.

The opinion of the court was delivered by

ISHAM J. The note on which the plaintiff has declared, was executed in common form by Daniel and Hiram Aikens, payable to the defendant or order on demand, and was afterwards transferred to the plaintiff under the following written guaranty: "*I hereby guarantee this note good until January 1, 1850.*" It is insisted that there is a variance between the several counts in the declaration and the legal liability arising from this obligation. On this question it becomes necessary to determine the legal effect of the contract or guaranty, placed on the back of this note. The defendant guarantied the note *good* until January 1, 1850. He did not promise to pay the note on that day, nor that it should be paid by the makers, as was the guaranty in the case of *Partridge v. Davis*, 20 Vt. 500. It is an obligation on his part having rela-

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tion merely to the solvency and ability of the makers to pay the note; in other words, the defendant agreed that during the period mentioned in the guaranty, the makers of the note should be in that condition, that payment of the note could be enforced against them, if legal diligence was used for that purpose. The note was *good*, if during that period, they had the means of payment, or if payment could be enforced by legal measures. The contract of the defendant was collateral, and arose only upon the inability of the makers of the note to pay it, and of the plaintiff to collect it, when the contract matured. This construction of that guaranty is in accordance with the obvious intention of the parties.

That being the legal effect of this contract of guaranty, no recovery can be had under the first or second count in the declaration, for the defendant is not liable as indorser; nor on an absolute engagement to pay the note on that day, if the makers neglected to do it. We think, however, a recovery may be had on the other counts, and that the legal effect of the contract is sufficiently set forth, to avoid the question of variance. The third count states the defendant's promise to be "that the makers of the note were good and responsible for the amount of the note, and should so remain until January 1, 1850, and that payment could be enforced at any time until that period." The fourth count sets out the contract in its words, and by averments treats the obligation thereby created, as it is set forth in the third count. In each of these counts, we think, the legal effect of that contract of guaranty is sufficiently set forth. They differ only in the form or mode of setting out the same thing.

The liability of the defendant on his guarantee commenced when that degree of insolvency on the part of the makers existed, which rendered them unable to pay the note, or the plaintiff to collect it. In both of these counts it is averred, that the makers of the note were not before nor on the 1st day of January, 1850, good or responsible for the note, but on the contrary were poor, irresponsible, destitute of property, and the notes uncollectable of the makers. These averments, state a breach of that contract of guaranty; sufficiently so, to charge the defendant, and under those counts, we think the contract of guaranty was properly received in evidence.

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The general question in the case, therefore arises, whether upon the facts stated in the exceptions, the defendant is liable upon this guaranty. The plaintiff is not the party in interest. The suit is prosecuted for the benefit of the sheriff, by whom the debt has been paid to the plaintiff. The defense which is interposed by the defendant, rests upon two distinct and independent grounds; and we are satisfied that they are available in the case for that purpose. In the first place, the evidence introduced shows that there has been no breach of that contract or guaranty. It is conceded in the case, that on the 1st day of January, 1850, the makers of the note were not only the owners, but were in the open and visible possession of property, both real and personal, more than was sufficient to secure and pay this debt, and it does not appear that any attempt was made to show that a different state of things existed at any time between that date, and the time of giving the guaranty. It cannot be said, therefore, that before or at the time the guaranty terminated, the makers of the note were not good or responsible for its payment, nor that the plaintiff was unable to enforce its collection. So long as the makers continued in that situation, with those means at their disposal, and subject to an attachment of their creditors, the note was good, the makers were able to pay it, and the creditor could enforce its payment. This view of the case is not avoided by showing that previous attachments had been placed upon their property; for the whole object is attained, so far as this guaranty is concerned, if they were so disposed of, that the makers of the note, retained their property in their possession, and held it subject to their own disposal, and to the attachment of their creditors. The fact that there has been no breach of that contract of guaranty, has met with absolute confirmation, in the circumstance that on the 1st of January, 1850, the plaintiff attached the property of the makers, for which a receipt was obtained by the sheriff, and for the responsibility of which, the sheriff and the county were liable. Upon that liability of the sheriff, created by that attachment, the plaintiff, to whom this guaranty was given, has obtained payment, and actual satisfaction for his debt. There has been, therefore, no breach of this contract of guaranty; the note has proved good to him, as guarantied, for it has been paid to him on the attachment of the property of the makers of the note, and from liabilities growing out of it.

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In the second place, if there was a breach of that contract of guaranty, the defendant is discharged from his liability upon it, by the payment of that debt to the plaintiff by the sheriff, in consequence of his liability arising out of the insolvency and failure of his receiptor. It is insisted, however, that by the payment of the debt, the sheriff is entitled by subrogation to the right and the remedy of this plaintiff, against the defendant on this guaranty. For that purpose, and on that ground, this suit is prosecuted. It is undoubtedly true, that so far as the sheriff has been compelled to pay this debt out of his own means, he is entitled to the right and remedy of the creditor against the makers of the note. To that extent he may be treated as the purchaser of the claim, but it is only as against the makers of the note that this right of subrogation exists. 1 Lead. Cas. in Equity 96, note (2.) 2 Vernon 608. *Parsons v. Briddark*.

The suit that was commenced against the makers of the note, was for the benefit of the creditor and this defendant, who at the time stood as surety or guarantor for the makers of the note. When the sheriff attached the property, and took a receipt for the same, he stood, to the extent of the value of the property in the shoes of the debtors, the makers of the note; and the creditor, as well as the guarantor, could look to the sheriff for the application of the property attached, in payment and satisfaction of the note, and of the defendant's contract of guaranty. If by the insolvency of the receiptor or by his neglect, the property attached has been lost, or rendered unavailable, and the sheriff rendered liable for the debt, his payment of the same was, so far as the creditor and this defendant as guarantor was concerned, a payment by one, who stood in the shoes of the makers of the note; for it was paid in consequence of his liability arising from the attachment of their property, on this debt. The defendant stood as a surety or guarantor, to the creditor for a given period for the goodness of the note, or the ability of the makers to pay it. When it appears, therefore, that during the period for which the guaranty was given, the note was good, and the makers able to pay the debt, there is no propriety in saying, that the defendant, as guarantor, is now to be made liable for the inability of the makers to pay the note, when that inability arose subsequently to the period when that guaranty terminated; nor is there any proprie-

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ty in saying that the sheriff shall be subrogated to the remedy of the creditor against the defendant, as guarantor, when that claim would have been satisfied and cancelled by the property of the makers of the note, but for the neglect of the sheriff in making the attachment, or in taking insufficient receptors for the property.

We are fully satisfied therefore, that the defense in this case, is available, on the ground that there has been no breach of the contract of the guaranty, and also, that the payment of the debt by the sheriff will inure to the benefit of this defendant, and was a discharge of his liability on his guaranty; and though the sheriff may have paid the debt out of his own means, he can be subrogated to the rights of the creditor, only as against the makers of the note, and not against the defendant.

The judgment of the County Court is affirmed.

RUFUS KENDRICK v. DANIEL TARBELL, JR.

Debt on Bond. Arbitration. Award.

Where parties make a submission to arbitrators, and by bond bind themselves to abide by and perform the award, the fact, that the arbitrators, in making their award, state their decision in detail upon each claim, thus making a succession of awards, will not vitiate the award.

Nor will the fact, that the arbitrators, in so making their award, do not strike the final balance, but find the balance on each claim, giving to each party the balance coming in his favor, thus leaving the final balance for matter of computation, be fatal to the award.

All reasonable presumptions will be made in favor of an award, as much as in favor of a judgment; and the party objecting to the legality of an award, must show clearly the fact of its illegality.

And where the plaintiff and defendant made their submission by bond, and the award was made in detail on each claim, the arbitrators, giving to each party the balance coming in his favor, without striking the final balance, this being matter of computation, and the plaintiff brought his suit on the bond, for non-performance of the award by the defendant, it was held, that his remedy was properly on the bond, and that if defendant withheld the portion of the award in his favor, the plaintiff might have judgment on that portion in his favor; and

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that there was no error because the judgment was so rendered, and afterwards, (under a rule of the court,) the balance found due the defendant was deducted.

That the concerns of a partnership are not in a state to be finally settled, does not preclude the partners from making a partial settlement by arbitration.

DEBT on bond; the bond was an arbitration bond, conditioned that defendant should pay to the plaintiff the award of the arbitrators.

The defendant pleaded that it was not his deed; and also on *oyer* set out the condition of the bond, and pleaded no award.

The plaintiff in his replication set out several or a succession of awards; to which the defendant rejoined no legal award.

Trial by the jury. On the trial the plaintiff read in evidence the bond declared on; its execution being conceded. The plaintiff also read in evidence five awards, which were the successive awards described in his replication. These awards were made where plaintiff and defendant had adverse interests, in several firms with which the parties were connected.

The defendant offered in evidence two awards in his favor, which it was conceded, were made by the same arbitrators on the same submission, and as to that part of the matter between the parties therein mentioned.

It appeared, that the arbitrators made seven successive awards upon the matters submitted to them; in five of the said awards they found balances due plaintiff, and in two of the said awards balances due the defendant, but the arbitrators did not strike the final balance in the award, leaving that for matter of computation.

The defendant insisted, that the plaintiff was not entitled to recover; but the court,—COLLAMER, J., presiding,—directed a verdict and judgment for the plaintiff, for the whole amount of the awards mentioned in his replication, (being the five awards in plaintiff's favor,) under a rule, (by plaintiff's assent,) that the amount of the said awards presented by the defendant be deducted, (being the two awards in defendant's favor,) if the defendant so elects. To which decision of the court, the defendant excepted.

After judgment the defendant elected to have the amount or sum of his two awards deducted from the judgment, and it was so deducted.

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The facts, in detail, more fully appear in the arguments of counsel, and the opinion of the court.

J. S. Marcy and Converse & Barrett for defendant.

I. The judgment below, for the full amount of all the awards, was erroneous.

The fact that defendant had the two awards in his favor deducted from the judgment, cannot vary the question.

The *bond* was the only writing of submission. By that it seems that only such matters "*wherein the interest of the parties was adverse,*" were submitted.

The arbitrators could only decide *matters submitted*. And the defendant is only bound to fulfill and execute a *legal award*.

1st. *Award*—The first award finds Tarbell and Spaulding indebted to D. Tarbell & Co., in \$4,066,95, after deducting money in Spaulding's hands of \$184,55. It gives Kendrick one third, \$1,355,65, and costs \$15,50.

It does not any where appear that the interest of the parties in this, was "*adverse.*"

This also left money in the hands of Spaulding, and a note due to Downer, unsettled. It makes no final decision between the parties in this matter. The award should have been in defendant's favor and against the members of the two firms.

2d. *Award*—The second award is between Kendrick, (*plaintiff*) and A. D. Hutchins & Co. The award allows plaintiff, as one third of profits,

\$117,51

And deducts account against plaintiff,

87,87

Balance for plaintiff,

\$29,64

It finds no "*adverse interest,*" and none appears.

3d. *Award*—The third award is between D. Fay & Co., and D. Tarbell, Jr., and gives damages for breach of contract,

\$100,00

Book account,

94,91

\$194,91

This sum is awarded, as it should be, to D. Fay, & Co. The plaintiff, therefore cannot recover for it.

4th. *Award*—The fourth award is between D. Fay & Co., and D. Tarbell & Co.; D. Fay & Co.'s account is \$7,479,01. It improperly adds the capital invested by the plaintiff in the firm of

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D. Tarbell & Co., \$2,147,42. It finds balance in favor of D. Fay & Co., of \$105,81.

1. No "*adverse interest*" is shown. 2. The defendant is ordered to pay *D. Fay & Co.*, \$70,20, it being two thirds of the \$105,81. 3. The plaintiff cannot recover for this, as it was not to him, but to him and the defendant. 4. The respective rights of Tarbell, Fay and Kendrick, are not stated so that the court can do justice between them. 5. The Downer note should have been adjusted, if at all in the first award. It has nothing to do with this.

5.th Award—The fifth award is between R. Kendrick and D. Tarbell & Co. It allows plaintiff two thirds of \$567,10, paid on the Downer note, being \$378,07.

1. No "*adverse interest*" is shown. 2. The balance of Downer's note is still outstanding. 3. The copartnership is left unsettled as before the award. 4. No submission; it is not named in the bond of submission.

II. But did the parties submit all matters of difference in the cases enumerated, as well as those wherein their *interest* was *adverse*?

Their awards should have been between the different *firms* respectively in all cases. No authority is given to award in any other way; and the award must follow submission to be binding. Had the parties intended differently, they would not have named all the different firms in their submission.

III. The plaintiff cannot recover on any award to the firm of which he is a member, or when others are interested with him, this being a suit in the name of plaintiff alone.

1. Suits should have been brought on the awards by those interested, and to whom they were made. 2. Such suits can now be brought, and therefore plaintiff can recover no damage in this case.

IV. If it is insisted that defendant is bound to respond to the delinquencies of all these parties, then it is clear there should have been but one instead of seven awards or payments of awards. The balance of all the matters submitted should have been ascertained and struck by the arbitrators.

V. But will it be insisted, that under the present pleadings there can be no apportionment, that the plaintiff must recover all the awards whether made to him personally or to him and others?

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That the defendant, in order to secure his rights in this matter, should have demurred to the replication?

A. P. Hutton for plaintiff.

To the plaintiff's declaration on his bond, the defendant after setting out the condition pleads no award.

The plaintiff replies setting out a series of awards.

If the defendant had wished to raise any question as to the sufficiency of the replication, or the awards recited therein, he should have demurred. Or he might have set forth the awards not therein recited, and then demurred. *Fisher v. Pimbley*, 11 East. 187.

The defendant rejoins that the awards were not legal as to him, and tenders an issue to the country, which is joined.

The reason for the conclusion that they are not legal should have been stated. 1 Saunders 327, note e.

If this be an issue of law, we say the verdict was right, because the replication is sufficient.

It is therein stated that the arbitrators did award, &c., of and concerning the premises, &c., and professes to set out but a portion thereof.

There was no necessity for the plaintiff to set forth any more of the awards than were favorable to him.

But if the law be otherwise, the proof cured the defect.

If it be an issue of fact, we say the evidence required such a verdict.

It has been said that the awards are bad, because the arbitrators did not award as to the balance of the Downer note.

To this we say.

1. The award which shows there was such a balance, contains a proper direction as to the payment of it, which was all the arbitrators could do in respect to it.

But if the award as to the payment of the money by plaintiff to Downer, is to be taken alone, then we say; 2. It does not appear that there was any balance due on that note, and the presumption would be that there was no controversy about it.

But, if it should be found that the award is bad as to some of the matters, it does not follow that it is so as to others. 1. Because the matters submitted are distinct—between different parties—no

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way dependent upon each other. 2. Because the terms of the submission are such as not to require it.

The condition is several as to the defendant and each of the firms. Russ. Arb. 250. 11 E. C. L. 12.

The defendant submitting for himself and his partners, are bound by the submission. Russ. Arb. 26, 27, 28.

There is no error in the judgment of the county court.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. The controlling question made in this case by defendant is, whether it is competent for the plaintiff to recover in this action the amount of awards, in favor of other parties. The only instance in which any thing is awarded to any other than the plaintiff is in the third and fourth subdivision of the award, in the controversies in the third, between D. Fay & Co., consisting of D. Fay, and Rufus Kendrick, and the defendant, Tarbell, and in the fourth division, between D. Fay & Co., and D. Tarbell & Co., the interest of which, was at the time in Kendrick and Tarbell. These matters are expressly submitted, so far as Kendrick and Tarbell had adverse interests, and that they had here, is apparent, inasmuch as Tarbell is not a member of D. Fay & Co. The bond then obliges defendant to pay this award, and the present seems the most natural and obvious remedy, if not the only one. No doubt it is the one contemplated and provided, by the parties, in their submission. If the bond obliges the defendant to pay such awards to the plaintiff, we see no objection to his here recovering the amount of such awards. And the bond seems to us to oblige the defendant, to pay all the awards, or to pay the "*award*" against defendant, which the arbitrators should make upon the matters submitted. And these five awards are but the detail of "*the award*," which the submission seems to have contemplated, and we do not perceive how the award is, in any sense invalidated, because the decision upon each claim is stated in detail. It might not have been necessary, but it will not vitiate the award, unless it show error. Nor will it vitiate the award in our opinion, that the final balance is not struck in the award. That is matter of computation, and the judgment in this case, was based upon such computation, as we understand from the bill of exceptions. As then the payment of this award,

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which is the final balance of all the particular matters passed upon, is the only mode provided in the condition of the bond, for saving the same, the defendant must do it, or be made liable upon the bond; and not having done it, he is liable, and the amount of damages is the same sum. Besure, if the arbitrators made a separate award upon each matter submitted, without stating the final balance, giving to each party the balance coming in his favor, we do not think this such a departure from the submission, as to be fatal to the award. And if the defendant had withheld his portion of the award, it might have been proper enough for the plaintiff, to have judgment on that portion in his favor. But as this judgment is for the final balance, there can be no possible objection to it upon this ground. Nor will the court reverse the judgment, because the judgment was first rendered for the whole balance due plaintiff, and the balances found due defendant subsequently deducted, even if that were erroneous, (which it is not,) because the result is the same, as if the balance had been struck, before judgment was rendered.

II. The objections to the detail of the award do not any of them appear to us fatal. And we would, in any doubt, feel bound to make all reasonable presumptions in favor of an award, as much as in favor of a judgment. And it is incumbent upon the party objecting to the legality of an award to show clearly the fact of its illegality.

1. The objection, that only matters were submitted where the parties had adverse interests and that these matters do not seem to be of that character does not seem to us to be well founded in fact. They seem all to have been cases where the parties to the submission had adverse interests. And if there were any doubt upon that point, upon the papers in the case, the consideration, that it was so treated by the parties, before the arbitrators and by the arbitrators themselves, would seem to be altogether satisfactory, upon that point.

2. The money left in Spaulding's hands and the balance of the Downer note unpaid, it is said are not finally settled. But we do not see how it could have been any more finally determined by the arbitrators. The money in Spaulding's hands they could not get to divide, and when it should be realized, there was no dispute about the ratio of division between these parties. So too in regard

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to the payment of Downer's note, the arbitrators expressly stated the ratio of obligation, to pay the amount due, by each of these parties, and that it remains unpaid in part, and is to be paid by the parties, or this is the legal inference. What more could they do? It certainly does not occur to us. And the fact that the concerns of a partnership are not in a state to be finally settled, does not preclude the partners from making a partial settlement, even by arbitration.

3. The awards, or the portions of the award, in favor of D. Fay & Co., one of whom is not party to the submission, will not bind that party if he had, at the time of the submission and award, interests distinct from the parties to this submission. They could not therefore probably maintain an action upon such awards, to which in the submission or hearing, they were not all parties. But as the bond is to pay the awards, and the plaintiff is interested in favor of the party to whom the awards are made, we see no objection to including the amount in the damages, for breach of the bond. But it does not appear but the plaintiff and defendant might have owned the interest of all the other parties, and it is stated by the arbitrators, that defendant did own the interest of Spaulding. And the parties to the submission, if they did not own the interest of the other partners must have known the law and entered into the bond understandingly and must perform it.

4. The fifth award as it is called, is upon matters strictly between Kendrick and Tarbell, as the latter owned Spaulding's interest and so comes within the terms of the submission.

As then the judgment meets the merits of the case, it does not become necessary to look into the forms of pleading which were objected to by plaintiff, as not legally raising the questions argued by defendant's counsel, at the bar.

Judgment affirmed.

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LOTON GASSETT v. BENJAMIN B. SARGEANT.

Attachment of the property of joint owners—A delivery to one co-tenant, a delivery to both—Officer's liability, &c.

If an officer attach property owned by two, as tenants in common, upon debts of both tenants, and proceeds to sell it upon the writs of attachment, he must ordinarily notify all the parties to the writs or attachments, of the appraisal, under the statute, and if one of the tenants has no notice of the appraisal, it will be so far as he is concerned the same as if no appraisal had been made.

And the officer, having taken the property from the joint possession of both co-tenants, may surrender it to either.

And an officer attaching property in any case, may, if he choose, deliver the property to the creditor for safe keeping, during the pendency of the suit, and as security for the re-delivery of the property, take its value in money of the creditor; and of this the debtor cannot complain during the pendency of the suit.

The defendant, as constable, attached a quantity of cheese, which was the joint property of the plaintiff and one S., on writs of attachment against both tenants; the cheese was appraised without the knowledge of the plaintiff, and S., the co-tenant deposited with the defendant the appraised or agreed value of the cheese, and the defendant delivered the same to S.; the suit against the plaintiff having been determined in his favor, and after a demand of the cheese of the defendant, he brought his action of trover for the same—*Uckl*—under these facts, that defendant's proceedings with the property were not equivalent to a public sale of the whole of the cheese, nor was the defendant guilty of a conversion, and that the delivery of the cheese to S. one of the joint owners was to all intents a delivery to the plaintiff.

TROVER for a quantity of cheese, and certain other personal property. Plea, the statute of limitations as to all the property but the cheese and not guilty as to that. Trial by the court.

On the trial, the plaintiff abandoned the right to recover as to all the property mentioned in the declaration, except said cheese.

The court found from the proof the following facts :

That on the first day of April, 1841, the plaintiff and one Jesse Stedman owned each an undivided half of said cheese, and that the same was in their possession, in the town of Chester; that while they thus owned said cheese, and while it was thus in their joint possession, to wit, on said first day of April, 1841, it was taken out of their custody and possession by the defendant, who was then constable of said Chester, upon and by virtue of writs of attachment, one in favor of said Stedman against said Gas-

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sett, (the plaintiff) and one in favor of William Marsh against said Stedman, on each of which was attached an undivided half of said cheese. Soon after said cheese was attached and while the same was in the custody of the defendant by virtue of said attachment, said defendant caused the whole of said cheese to be appraised according to the statute in such case provided, but of this the plaintiff had no notice, and after said appraisal said Stedman paid over to the defendant the full amount of the appraisal of the whole of said cheese, and the defendant thereupon delivered the cheese to said Stedman. Afterwards, to wit, at the May Term of Windsor County Court, 1848, Stedman became non-suit in his aforesaid suit against said Gassett, and thereupon, after demand of said cheese by the plaintiff, this suit was instituted to recover for said cheese.

Upon these facts, the County Court, May Term, 1852,—COLLAMER, J., presiding,—rendered judgment for the plaintiff to recover the value of an undivided half of said cheese.

Exceptions by the defendant.

H. E. Stoughton for defendant.

The officer was bound to deliver said property to Stedman upon his giving the requisite security. Comp. Stat. 247 § 33.

And a delivery to Stedman one of the joint owners was a delivery in law to both, for as is said in *Frost v. Kellogg*, 23 Vt. 308, "unless the officer in such case can relieve himself from liability by delivering the property to either joint owner, his position is truly critical and embarrassing." The court say, "he surely has no authority to act as a divider between them, and if they will not agree who shall take the property he must keep it and stand the consequences; we think he may deliver the property to either joint owner."

But it may be insisted, that Gassett, not having notice of the *appraisal*, constituted all the proceedings as against him a nullity; that the attachment was thereby dissolved, and that under such circumstances the defendant was guilty of a conversion of the plaintiff's portion of the cheese.

The statute, in terms, provides that upon application for an appraisal of property, the officer shall give notice to all parties interested, or their attorneys, of such application. Comp. Stat. 246

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§ 30. But the statute does not contemplate that notice of the appraisal shall be given, and it was held in *Abbott v. Kimball*, 23 Vt. 542, that no such notice was necessary.

The case finds, in terms, "that the defendant duly caused said cheese to be appraised according to the statute in such case provided," but of this, i. e. the *appraisal*, the plaintiff had no notice.

Stedman and Gassett being joint owners of the cheese, the defendant, in order to constitute a valid attachment of the same, upon a writ of attachment against Stedman, must take and maintain the exclusive possession of the whole. This doctrine is fully recognized in *Whitney v. Ladd*, 10 Vt. 165, and also in *Heald v. Sargeant*, 15 Vt. 506.

If the appraisal is void as against Gassett, then the officer has got Stedman's money, which he is bound in law to apply in satisfaction of any judgment which Marsh may recover in his suit against Stedman, and the balance, if any, he must return to Stedman. And in case Stedman succeeds in said suit, then, in that event, the defendant is bound to account to Stedman for the full amount deposited. And if the officer is liable in this suit to Gassett for one half of the property, Stedman is the lucky man; for surely the defendant would have no right, as between himself and Stedman, to hold Stedman's money to indemnify himself against his own torts.

If the delivery as against Gassett is valid, as we insist it is, then the success of Gassett in obtaining a judgment would not operate to make the officer a *tortfeasor*, but Gassett would be entitled to recover of the officer, if he could under the circumstances have any claim upon the officer, one half of the money deposited.

But whether Stedman acquired any title to Gassett's half of the cheese, if the delivery was valid against both, is a question not necessary to determine in this suit. It is enough for our purpose to know that he cannot be made liable in this action.

L. Adams for plaintiff.

1. The facts found, by the court, show such an abuse of the defendant's authority that he was liable as a trespasser *ab initio*, and an action of trespass might have been sustained. *Abbott v. Kimball*, 19 Vt. 551. *Sutton v. Beach*, 2 Vt. 42. *Weld v. Oliver*,

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21 Pick. 559. *Barrett v. White*, 3 N. H. 210. *State v. Moore*, 12 N. H. 42.

2. Whether trespass could have been sustained in this case is immaterial; for the action is trover, and the case shows a conversion clearly. *Taft v. Vickery*, 1 D. Chip. 241. *Ladd v. Hill*, 4 Vt. 164. *Bradley v. Arnold*, 16 Vt. 382. *White v. Morton*, 22 Vt. 15. *Stedman v. Lull*, Windsor County Adjourned Term, 1846, holding, that an officer after the appraisal cannot sell at private sale, and if he does, he is a trespasser *ab initio*. 1 Chitty's Pl. 182. 3 C. & P. 186.

3. The issue having been tried by the court, and the evidence having tended to show a conversion, the judgment is conclusive. *Noble v. Admr. of Jewett*, 1 D. Chip. 86. *Forbes v. Davidson*, 11 Vt. 660. *Strong v. Barnes*, 11 Vt. 221. *Kirby v. Mayo*, 13 Vt. 103. *Cilley v. Cushman*, 12 Vt. 494. *Stearns v. Howe*, 12 Vt. 578. *Kent v. Hancock*, 13 Vt. 519. *State v. Carr*, 13 Vt. 573. *Card v. Sargeant*, 15 Vt. 398. *Hodges v. Hosford*, 17 Vt. 617. *Seward v. Hefflin*, 20 Vt. 144. *Emerson v. Young*, 18 Vt. 603. *May v. Bliss*, 22 Vt. 477. *Cottrill v. Vanduzee*, 22 Vt. 511. *Swift v. Day*, 23 Vt. 656.

The opinion of the court was delivered by

REDFIELD, Ch. J. The leading question in this case is, whether the defendant's proceeding with the property was equivalent to a public sale of the whole property. If so, it is well settled that plaintiff may maintain trover for his interest therein. *Ladd v. Hill*, 4 Vt. 164. *Bradley v. Arnold*, 16 Vt. 382. *White v. Morton*, 22 Vt. 15. This is regarded as settled law, in this state, notwithstanding we hold, that the sale of the entire chattel, by one tenant in common, will not enable his co-tenant to maintain trespass, or trover, against him, inasmuch as the title is not divested, and no right of possession is violated. *Tubbs v. Richardson*, 6 Vt. 442. *Hurd v. Darling*, 14 Vt. 214. *Sanborn v. Morrill*, 15 Vt. 700.

The property was attached, upon the debt of both tenants, by the defendant, and if the officer had proceeded to sell, it would have been incumbent upon him to have notified all the parties to the suits or attachments, of the appraisal, under the statute. Its terms seem to imply that, in ordinary cases, perhaps not in all;

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and the bill of exceptions, in this case, seems to import, but not very explicitly, that the plaintiff had no notice of the appraisal. It would then, so far as he was concerned, be the same, as if no appraisal had been made. But we are unable to see, why giving up the property to the other tenant, amounts to a conversion. The defendant had the right, to take the whole property, upon the process, against one of the tenants. *Reed v. Stephenson*, 2 Vt. 120. *Whitney v. Ladd*, 10 Vt. 165. If the defendant rightfully retained the property up to the time of the appraisal, on one, or both the processes, the abandoning it at that time, could not make him a wrong doer. Nor could the fact, that he received a sum of money of the other joint owner, equal to the appraised or agreed value of the whole property, without the knowledge of the plaintiff, be any thing of which he could complain, so long as he was not compelled to pay the money. If there was any wrong committed by the defendant, it would seem to be in compelling Stedman to deposit the value of the whole property, when only an undivided half was attached on his debt. But of this the plaintiff need not complain, as it does not seem to have wrought him any injury. And it would seem to have been altogether voluntary on Stedman's part, and very probably to save the necessity of giving notice to plaintiff, Stedman being the creditor, in the suit against plaintiff. The transaction then, so far as the plaintiff was concerned, was equivalent to a surrender of Stedman's attachment. It might not have been so intended; Stedman might have supposed that by the appraisal, and depositing the money, he acquired a legal estate in the whole property attached; but there is nothing in the statute giving it that effect, and nothing in the transaction, tending to any such result. It is, so far as plaintiff is concerned, or the attachment of his half, but a deposit of the value of the property attached, by the creditor, and giving up the property to the debtor. For the possession of one tenant is the possession of both, and the property being taken by defendant, from the joint possession of both tenants, he might well surrender it to either. He could not surrender it to both, and he could not divide it. He must surrender it to one, and to which, was indifferent, according to the decision in *Frost v. Kellogg*, 23 Vt. 308. And that there has been nothing; in this case, in the nature of a public sale, is most manifest. The apparent confusion in the case arises un-

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doubtedly, from the peculiarity of the rights growing out of the tenancy in common. If it is considered, in this case, that the defendant took the value of the property of the creditor, and surrendered it to him, as his own, it might be treated, no doubt, at the election of the debtor, as a conversion of the property.

But the officer attaching property, in any case, might if he chose, deliver the property to the creditor, for safe keeping, during the pendency of the suit, and as security for the re-delivery, take its value in money of the creditor. And of this the debtor could not complain, so long as the suit was pending. And when that was determined in favor of the debtor, the property would belong to him, and the money to the creditor. And so here, if both suits were determined. But this case only shows the determination of one suit. And the defendant may still retain the property, upon one suit, and the half of the money, (if one half can fairly be regarded as released, by the failure of the suit against plaintiff,) belongs to Stedman, who deposited it. And plaintiff's right to the absolute restitution of the property, will not accrue, until both suits are determined, and then the property being in the possession of his co-tenant, will be, to all intents, a restitution, the same precisely, as if restored to himself. This is the very point decided in *Frost v. Kellogg*, and not matter of argument, in the opinion, more than it is here. We feel that we could not sustain the plaintiff's claim, on the facts stated, without overruling that case, and departing very essentially from long established principles.

Had the party chosen to wait for the defendant to sell the property, and made no deposit, it is by no means certain the defendant would have proceeded. The presumption is perhaps, that he would have proceeded, in conformity to the statute, either to sell only the interest of Stedman, or else to give the plaintiff notice, before he proceeded against his interest. Certain it is, he does not appear to have sold plaintiff's interest, or to have done any act equivalent. There is nothing in the case of *Abbott v. Kimball*, 19 Vt. 552, which seems to us to favor the view, that defendant has been here, guilty of any abuse of authority. Nor is there any testimony detailed in the bill of exceptions, which could be justly regarded as having had any legal tendency, to show a conversion by defendant, so as to conclude that question, by the finding of the county court upon the facts.

Judgment reversed, and case remanded.

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WILLIAM BURTON v. PERKINS N. WILEY.

[IN CHANCERY.]

Bill to obtain a new trial, in an action determined at law.

In an application for a new trial, where the case has been determined at law, chancery will not grant relief, unless it appears, that the party has failed of obtaining redress in the suit at law by the fraud of the opposite party, or through inevitable accident, or mistake, without any default either of the party or his counsel.

And where in the court of law, it was left to the choice of the counsel of the party, either to take a judgment for nominal damages, or have the case sent to the court below for a new trial, and from a misapprehension of facts the counsel elected to take the judgment, and such a judgment will be liable to do the party injustice, and the time prescribed by statute to petition for a new trial had elapsed, and the party brought his bill in chancery for a new trial or other relief—*Held*—that these facts do not bring the party within the rule, or afford ground for relief in chancery.

That a party, in such a case, is without redress in the court of law, and that the time has elapsed to petition for a new trial, forms no substantive ground for relief in equity.

APPEAL from the court of chancery.

The bill was brought to obtain a new trial at law, in an action which had been determined at law. The defendant demurred to the bill in the court of chancery. Chancellor COLLAMER dismissed the bill, and the plaintiff appealed to this court.

The substantial grounds for relief, alleged in the bill, sufficiently appear in the opinion of the court.

Converse & Barrett for plaintiff.

Insisted—I. That the court of chancery has power to decree a new trial, and cited 1 Story's Eq. Juris. 179. 2 Story's Eq. Juris. 173. Mitford by Jeremy 153. *Tilly v. Wharton*, 2 Vern. 278. 1 Eq. Cas. Abr. 377. *Torey et al. v. Young et al.*, 2 Vern. 437. *Floyed v. Jayne*, 6 J. C. R. 479. *Carrington v. Holabaird*, 17 Conn. 530. *Same v. Same*, 19 Conn. 84. 10 U. S. Dig. 154 § 19. *Colyer v. Lungford*, 1 A. K. Marshall 237. U. S. Eq. Dig. 86 § 56.

II. A new trial could not be obtained by petition, because the time prescribed by statute had elapsed before the cause for asking a new trial was known. Comp. Stat. 280 § 4.

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III. Claimed, that plaintiff, from the facts disclosed in the case, is entitled both legally and equitably to have of the defendant redress, and that plaintiff ought to have a new trial.

That chancery has granted relief, where the occasion for asking it, was the fault of counsel. *Robinson v. Bell*, 2 Vern. 146. And also mistake of the party, or party and counsel. See cases cited in *Robinson v. Bell*; and *Carrington v. Hollabaird* cited *ante*.

New trials have been granted at law, for mistake of counsel, as well as of parties. See *Dow v. Hinesburg*, 1 Aik. 35. *Starkweather v. Loomis*, 2 Vt. 573.

Washburn & Marsh for defendant.

The counsel after ably discussing at length, the facts alleged in the bill, urged that—no fraud on the part of the defendant is stated in the bill, directly or indirectly. The whole bill proceeds upon the ground of accident or mistake, and the result of all the facts is, that whatever injury has resulted to the plaintiff has proceeded from *negligence*.

And insisted—That the court cannot proceed to open the case of *Burton v. Wiley*, for further litigation, without a violation of those rules, which have heretofore been applied in similar cases. *Essex v. Berry*, 2 Vt. 161. *Emerson v. Udall*, 13 Vt. 477. *Briggs v. Shaw*, 15 Vt. 78. *Pettes v. Bank of Whitehall*, 17 Vt. 435. *Fletcher v. Warren*, 18 Vt. 45. *Warner v. Conant*, 24 Vt. 851. 2 U. S. Eq. Dig. 867 § 45. 10 U. S. Dig. 170 § 282. 9 U. S. Dig. 169 § 251, 253.

The opinion of the court was delivered by

REDFIELD, Ch. J. This is a bill in chancery, to obtain a new trial in a case, finally determined in this court upon exceptions, the judgment having been entered up for nominal damages, on account of an omission to prove a demand, made upon this orator, and by consent of the counsel, in this court. It is not alleged in the bill, nor is there any pretence, of any fraud or influence of the defendant in the matter. The bill is based altogether upon the misapprehension of the counsel as to the facts, or the proof existing of the fact, in which the case was then defective, and the sickness of the orator, and his consequent absence from

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court, and that the existence of the proof, and the embarrassment consequent upon the judgment being entered for nominal damages in the case, did not come to the knowledge and appreciation of the plaintiff and his counsel, until the time for bringing a petition for a new trial in the case at law, had long since elapsed, and the very great injustice which is likely to fall upon the plaintiff, if he is not allowed to go for his full damages, in the action at law, or else recover them in the court of chancery. These are the substantial grounds for relief alleged in the bill which is demurred to, and was dismissed in the court of chancery.

The early English cases which have been brought to our notice, and which we have before had occasion to examine, and some of the American cases, and especially the case of *Colyer v. Langford*, 1 A. K. Marshall R. 237, seem to go upon the ground that a bill will be entertained for a new trial, in an action determined at law, upon very much the same grounds that new trials are granted at law, where the courts of law have no means of granting a new trial, in the case, either for defect of powers, or from lapse of time. But the numerous cases in this state upon the subject, from that of *Essex v. Berry* 2 Vt. 161, down to that of *Warner v. Conant*, 24 Vt. 351, have established the rule here upon a very much narrower basis. The rule of the best considered and more recent cases upon this subject is, that the party must have failed in obtaining redress in the suit at law, by the fraud of the opposite party, or inevitable accident or mistake, without any default either of the party or his counsel. That is the rule laid down in the cases above cited, and in the intervening cases, among which we may name *Emerson v. Udall*, 18 Vt. 477, and *Pettes v. Bank of Whitehall*, 17 id. 435. The latter case, in principle, and in some of its facts and circumstances, has a considerable analogy to the present. The rule in Connecticut, *Carrington v. Hellabaird*, 17 Conn. 530, S. C. 19 id. 84, is laid down in almost the same terms in which it has been established here; stress being laid upon the fact that the plaintiff's failure to obtain justice at law, has been "without fault on his part." And by this we understand not wilful fault, but such want of care and diligence, and prudence, as is requisite in the ordinary business of life.

Now in applying these principles to the present case, it must be apparent at once, that the real basis of the bill, is to be found in

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the fact, that the time to petition for a new trial at law has expired, and that the plaintiff's counsel have consented to such a judgment, in the court of law, as will be liable to do injustice to him.

So far as the first ground is concerned, it is merely an application to be relieved, in equity, from the effect of the statute of limitations, which precludes redress at law. In this respect this case very closely resembles that of *Fletcher v. Warren*, 18 Vt. 45, in principle, certainly. For although that case does not profess to seek redress, upon that ground chiefly, it is obvious that no other real necessity for a resort to a court of equity, is readily discovered in the case. It is scarcely needful to say, that no such general ground of relief, in courts of equity, exists. And although the case of *Colyer v. Langford* alleges, in the note read to us, something of this kind in regard to new trials, it will probably be found when the case is examined, that nothing more is decided, than that to afford relief, in such case, it must appear that he is now without redress in the courts of law, and that the party has failed of a trial at law, through fraud in the opposite party, accident, or mistake, without his own fault, and that the remedy there lapsed also, without his fault. I am not aware of this fact ever forming any substantive ground of relief in equity, although by some casual omission of a negative, through the absurd blunder of some one, I am made to say so, in so many words, in *Hall v. Hall*, 8 Vt. 162. But the decision is the exact contrary to all purposes, and in all points.

There remains then, only the entry of judgment in this court for nominal damages. This was done by no action of the court, by no solicitation of the opposite party, but against their will, very likely, and by the express consent of the counsel for plaintiff, as is alleged in the bill. The court could not have entered up such a judgment, without the consent of the party or his counsel. The reasons which induced the counsel to consent to such a judgment, as alleged, are that the plaintiff's agent assured them, that "no such demand was made, and none such could be proved, and took upon himself to decide and determine it, to be safe to permit judgment to be entered for nominal damages, and judgment was so entered."

Now all this is consistent with the fact, that although it might have been known, that such a demand was made, the knowledge

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of it being confined to the parties, it could not, probably, be proved, unless Wiley had admitted it to some one, for *de non apparentibus et non existentibus eadem est ratio*. And this proof would probably satisfy the allegation. It is too, altogether consistent with the allegations here, that the counsel might have been chiefly influenced in determining to have judgment so entered, by the consideration of the uncertainty attending the litigation of other points in the case, which appear by the bill of exceptions made part of the bill, and the probable expectation that some redress might be obtained in the suits, in the name of the creditors. At all events, the counsel represented the party, and undertook to act for him, and with such knowledge as he had, elected to take judgment for nominal damages. Now was the case ever known, that any court should grant a new trial, because it was subsequently probable that he made an unwise election, and if he had elected to have the case opened, it would have been better for his client? For this is only probable now, and by no means certain. And if the party is given an election in this court, of this kind, and his counsel determine it, and on further investigation it turns out that the election was rash, or improvident, or that it is possibly or probably so, (for nothing more is shown here,) can the party resort to a court of equity, to give him the opportunity to make a new election, on the ground that the counsel mistook the law, or the proof in the case? It seems to me such a decision would be in conflict with all we have before decided upon the subject. After such a lapse of time it would be done, at the hazard of great injustice to the opposite party, by loss of testimony, and renewed litigation; after he had good reason to suppose it put at rest, and might be supposed to have given over that vigilance, which he would otherwise have exercised. We think, therefore, that the bill was properly dismissed upon the ground,

I. That neither fraud, accident or mistake, such as can form the basis of relief in a court of equity, is alleged in the bill.

II. It does appear, that whatever embarrassment the plaintiff is in, comes from the mistake, and misjudgment of his counsel, or agent, which is to all practical purposes the same, as if it had been that of the party himself.

III. That it is not by any means certain, that a new trial will alter the result, although it may be perhaps regarded, as probable.

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IV. The party had precisely that offered him which he now desires, and elected not to accept it, and as the other party is bound by the judgment on the election, it should not be left in the power of the plaintiff to get rid of it in chancery, upon the ground that he has changed his mind, or his counsel have, upon grounds then known to the party, or which might have been.

V. The plaintiff has suffered a long delay, after he should have made his counsel aware of the proof, if any existed, so that they could have applied to this court, at its next term, to correct the entry of judgment, and send the case back to the county court, which might possibly have been obtained at that time, and which is really what the party now requires, but which it is too late to grant in any court, if indeed it could ever have been done with safety.

Decree of chancellor affirmed.

ALONZO B. HOUGH v. JACOB PATRICK.

Parties to real actions—Equitable interest and possession—Erection of dam—Overflowing of land, &c.

A person, who has but an equitable interest, cannot generally sue at law, particularly in real actions, which are founded upon title; but where one has an equitable interest and is in the actual possession and occupancy of the premises, he may sustain a personal action for injuries done to that possession, against a wrong doer, or one who has not a better legal title or right of possession.

Actual possession is a good title against any one, who cannot show a better title.

And so where in 1835, the plaintiff went into possession of premises under a bond for a deed, and erected a house, and continued in possession till he finally took a deed of the premises; and the plaintiff's grantor in 1838, gave the defendant parol permission to erect a dam across a stream on the said grantor's land, which defendant erected and thereby injured the land of the plaintiff; in an action to recover damages for such injuries, it was held, that the parol permission to defendant, would create and give him but an equitable interest, which would be held subservient to the prior and superior equity of the plaintiff, and that the defendant had no right to interfere with, or disturb the plaintiff in the occupancy or possession of his premises; and that unless the defendant could establish a

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legal right to the erection and continuance of the dam, and also the right to flow the premises in plaintiff's possession, the plaintiff would be entitled to recover damages sustained at any time within six years before the commencement of his suit.

The interest of a witness, created by a mortgage given to his wife, is removed by an assignment of the mortgage, and a delivery of the assignment will be presumed, if nothing appears in the case showing it otherwise; so too, where the witness holds an assignment of the judgment recovered in a former trial, the objection to his competency is removed by a re-assignment of the same.

THIS was an action on the case, for flowing the plaintiff's land by means of a dam.

The plaintiff declares that on the 18th day of October, 1835, he was seized of the premises, and from thence hitherto hath been seized and lawfully possessed of them.

That defendant, on the first day of October, 1836, erected, on land contiguous upon the east to the land of the plaintiff and across Jewell Brook, a dam, and hath ever since kept up and continued said dam, thereby stopping and obstructing the natural course of the waters of said brook, thereby causing the waters of said brook to overflow and drown the plaintiff's land, destroying the plaintiff's crops growing thereon of the value of — and other damages —. The writ was dated the 22d day of October, 1849, and served on the 16th day of November, 1849.

Plea, not guilty within six years, and trial by jury.

On the trial, it was conceded that one William B. Wetherbee owned the land described in the plaintiff's declaration, together with the lands adjoining, and gave the plaintiff a bond for a deed of the land described in the declaration, (the bond is dated October 28, 1835.)

The plaintiff offered testimony tending to prove, that immediately after the date of said bond, he entered into possession of said land and erected buildings thereon, and had by himself and tenants ever since occupied and possessed the same; that plaintiff gave to one Jonathan Carpenter a quit-claim deed, dated September 25, 1837; but that the same was only as security for debt and in trust, and that on the fifth day of February, 1839, said Wetherbee executed a deed of said land to said Carpenter, who held the title in trust for the plaintiff, and that said Carpenter, on the 19th day of July, 1839, executed a bond for a deed to plaintiff;

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and that afterwards, on the 25th day of November, 1847, said Carpenter executed his deed of the premises to the plaintiff. (Copies of the said deeds and bonds were read in evidence, and put into the case.)

The plaintiff's testimony also tended to prove, that the next year after plaintiff received his bond from said Wetherbee, and entered upon said land, the defendant erected a dam on the stream running through said land, on the land of said Wetherbee, a few rods below the line of the plaintiff's land, and subsequently elevated the same, and continued and sustained the same up to the commencement of this suit, and that thereby the water of said stream has been flowed back in the channel of said stream over the plaintiff's land from time to time, thereby doing him great injury.

The defendant gave evidence tending to prove, that in 1835, he erected a blacksmith's shop on his land on said stream below the plaintiff's land, with a view to put in machinery to be propelled by the water of said stream; that in 1836, by permission of said Wetherbee the defendant erected a dam across said brook on the land of said Wetherbee, and that it set back the water in the bed of the brook only to the line, or a little over the line of the plaintiff's land, and that he never afterwards elevated it any higher, and that the same has never occasioned the water to flow on to the plaintiff's land; that said Wetherbee on the 22d day of June, 1847, executed to the defendant a deed of said privilege of keeping up said dam, which deed was read in evidence, and put into the case.

The defendant requested the court to charge the jury, that if the defendant erected the dam permanently on Wetherbee's land, and by his permission and before said Wetherbee deeded to said Carpenter in February, 1839, and that the defendant was then in the use and occupancy of said dam by said Wetherbee's permission, and continued so to use and occupy the same until the commencement of this suit, and that said Wetherbee deeded to the defendant said privilege in June, 1847, then the plaintiff cannot recover for any damage done by said dam as first erected.

The court,—COLLAMER, J., presiding,—declined so to charge the jury; but did charge the jury, that if they found the plaintiff rightfully took and held possession of said land from the time he took said bond from said Wetherbee, he would be entitled to re-

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cover for any injury occasioned to his possession and enjoyment of said land, within six years next before the commencement of this action, by reason of said dam erected or elevated after the plaintiff so took possession.

To which charge and refusal of the court to charge as requested, the defendant excepted.

In the progress of the trial, the plaintiff offered one Calvin R. Sears, as a witness, to whom the defendant objected on the ground of interest, and gave in evidence a copy of a mortgage deed from the defendant to Lucretia M. Sears, wife of the said Calvin, dated June 19th, 1848, and also a notice, from said Sears to the defendant, dated October 16, 1851, that plaintiff had assigned to him, the said Sears all interest in this suit. The plaintiff admitted that he assigned the judgment in this suit, and which was set forth in said notice, immediately after the last verdict in said case.

The plaintiff to remove said objection of interest, gave in evidence a re-assignment of said judgment to the plaintiff, dated June 9, 1853, also an assignment of said mortgage, by said Sears and wife, to Calvin L. Gilbert, dated December 9, 1851.

The court admitted the said Sears to testify, to which decision of the court, the defendant excepted.

In the progress of the trial, the plaintiff also offered testimony to show damages occasioned to him, by the flow of water on said land by said dam, since the commencement of this action; to the admission of which the defendant objected, and the same was excluded by the court—to which decision of the court excluding this testimony the plaintiff excepted.

S. Fullam for defendant.

I. The defendant insists, that he was entitled to the charge as requested.

(1.) Because the flowing back of water in the channel does not give a right of action without special damages. *Cooper v. Hall*, 5 Ham. 320, cited 3 U. S. Dig. 645 § 77.

(2.) Wetherbee had the right while owner of the plaintiff's land to subject it to servitude of this kind, and it would be subject to the same while in the possession of his grantee, and the owner of the servient tenement cannot prevent such servitude, or deprive the owner of the dominant tenement from enjoying the benefit of

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that servitude, whether the owner of the dominant tenement be Wetherbee or his grantee. *Nicholas v. Chamberlin*, Cro. Jac. 121. Gale & Whatley's Law of Easements 38 to 49. Angel on Water courses 57. *Story v. Odin*, 12 Mass. 157. *Grant v. Chase*, 12 Mass. 442.

(3.) The necessity of preserving such rights has been so apparent, that courts have held a period of enjoyment less than that required by the statute of limitations sufficient from which to presume a grant. *Record v. Williams*, 7 Wheat. 59. Angel on Water courses 68.

II. The court manifestly erred in charging the jury, that the plaintiff could recover for any injury occasioned to his possession and enjoyment of said land, by reason of said dam erected or elevated after the plaintiff took possession.

(1.) Because, there are numerous injuries occasioned by the erection of dams for which there is no redress; for instance, the reasonable detention of water in a pond for the use of mills, although it may injure the mills below it has always been held to be an injury for which no action could be sustained. *Tyler et al. v. Wilkinson*, 4 Mason 401. *Mason et al. v. Brinkerhoff*, 17 Johns. 306. Angel on Wat. 15, 16 and 17.

(2.) Every owner of a stream of water, has a right to erect a dam on his own premises and flow the water back to the extent of his own land, and if this do no injury to the proprietors above, when water is at its ordinary pitch, such proprietors cannot recover for damages occasioned by the water flowing. 3 U. S. Dig. 640 § 4.

III. Calvin R. Sears was improperly admitted as a witness. The mortgage to his wife created an interest, which should have excluded him, and the assignment to Gilbert did not vary that interest, for there was no evidence that Gilbert ever accepted it, and it was in the hands of the plaintiff. A witness who would take an assignment of a judgment as Sears did in this case, and then sell it back to the plaintiff for the sake of testifying would readily assign a mortgage to a man in Georgia, and put it into plaintiff's hands for the same purpose.

Washburn & Marsh for plaintiff.

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I. The defendant was not entitled to a charge in accordance with his first request.

(1.) Wetherbee, having in 1835, executed to the plaintiff a bond to convey, and deliver possession of the premises, could not give a license, by parol or otherwise, for the exercise of rights inconsistent with the plaintiff's enjoyment of the premises.

(2.) The plaintiff having taken possession of the premises in 1835, under the agreement for a deed from Wetherbee, and immediately erected buildings thereon, and continued in exclusive and adverse possession through the year 1836, and ever afterwards, the defendant must be charged with notice of the plaintiff's rights, derived from Wetherbee, and cannot assert any inconsistent rights, derived from the license which he received from Wetherbee in 1836. *Ripley v. Yale*, 18 Vt. 220. 19 Vt. 156. *Pinney v. Fellows*, 15 Vt. 541.

But it sufficiently appears from the case, that the defendant when he obtained the license in 1836, had notice *in fact* of the plaintiff's rights; for it is stated, that he gave evidence tending to prove that he so erected his dam, as to set back the water *only* to the plaintiff's line, or a little over, and that he never afterwards elevated the dam, and that the dam never did occasion the water to flow on to plaintiff's land.

But however the exceptions may be construed in this respect, this is a point in regard to which there never has been any controversy,—the notice to the defendant having been proved by the same testimony, which proved his license.

And the defendant can claim no paramount rights by reason of the erection of his shop, in 1835, "with a view to put in machinery to be propelled by the water of the stream."

(1.) It does not appear, that the erection was previous to the execution of the bond to the plaintiff, and the erection of the plaintiff's house, in 1835.

(2.) It does not appear, that the plaintiff had any notice of defendant's "*view to put in machinery.*"

(3.) It is not stated, what distance below the plaintiff's land the shop was erected; nor that the machinery, which the defendant had a "*view*" of placing therein, could only be propelled by erecting a dam sufficiently high, to flow the plaintiff's land.

And the fact is, that the shop was erected upon a dam, which

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had existed many years, and which did not flow the water to within many rods of the plaintiff's land.

II. The plaintiff's right of recovery was limited by the charge, to the injury to his *possession and enjoyment of the land*; and as it appears, that he was rightfully in *possession*, during the six years to which his recovery was limited, and the declaration proceeds for an injury to his possession, no question can be raised as to the nature of his *title*.

III. There was no error in admitting the testimony of Sears.

(1.) Whatever interest he acquired by the assignment to him of the previous judgment was purged by his re-assignment to the plaintiff. *Edwards v. Golding*, 20 Vt. 40.

(2.) That his interest as husband of the mortgagee was purged by the assignment of the mortgage, to Calvin L. Gilbert, was decided by this court when this case was last before them.

(3.) And in any event the judgment should not be reversed for this cause, since the objection for interest is now abolished by statute.

The opinion of the court was delivered by

ISHAM, J. The plaintiff has brought this action for the erection and continuance of a dam across a stream of water, in Ludlow, which caused the overflowing of his land.

In relation to the interest and right of the plaintiff in the land overflowed, we learn that the premises were formerly owned by Mr. Wetherbee; that on the 28th of October, 1835, Mr. Wetherbee executed his bond to the plaintiff for the conveyance of the land to him, and that immediately thereafter, the plaintiff entered into the possession of the premises, erected buildings thereon, and has continued his occupation and possession of the premises ever since. The premises were afterwards conveyed by Mr. Wetherbee and the plaintiff, to Mr. Carpenter as security for a debt, and in trust for the plaintiff, and on the 25th of November, 1847, were conveyed by Mr. Carpenter to the plaintiff; thus vesting in him the legal as well as the equitable title to the land. From the 28th of October, 1835, when the bond was executed, to the 25th of November, 1847, when the deed to the plaintiff was given by Mr. Carpenter, the plaintiff had an equitable interest in the premises,

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accompanied by the actual occupation and possession in his own right.

It is insisted that the plaintiff can sustain no action of this character against the defendant, for any injury during this period; and that the jury under the charge of the court, improperly estimated damages, sustained during a portion of that time, which arose from the erection of that dam.

As a general rule, an action must be brought in the name of the party whose legal right has been affected. A person who has but an equitable interest cannot generally sue at law, particularly in real actions, which are founded upon title. But where one is in the actual possession and occupancy of premises, he may sustain a personal action for *injuries done to that possession*, against a wrong doer, or one who has not a better legal title, or right of possession. Actual possession is a good title against any one who cannot show a better right. *Graham v. Peat*, 1 East. 244. 1 Chitty's Plead. 46. *Lambert v. Stroother*, Willis 221. *Hull v. Fuller*, 4 Vt. 199.

Unless the defendant, therefore, established a legal right, not only to the erection and continuance of the present dam, but the right also to flow the water upon the premises in the possession of the plaintiff, we think the court were justified in their charge to the jury, that the plaintiff's right to the premises was sufficient to entitle him to recover damages, which were sustained at any time within six years before the commencement of this action. *Hall v. Chaffee*, 18 Vt. 150.

In respect to the right of the defendant to erect a dam across this stream, we learn from the case, that on the 18th of August, 1835, Mr. Wetherbee conveyed certain premises to the defendant of which he is in possession, with the right of erecting a dam across that stream on the premises conveyed, of the same height a dam had formerly been erected. The defendant's buildings are erected upon those premises. This deed gave no right to the defendant to erect the present dam, as it was not erected upon those premises, but several rods above, and near the land of the plaintiff; indeed, the right to erect the present dam, and to flow back the water, is not claimed under this deed. The present dam was erected in 1836 upon the land of Mr. Wetherbee, and by his permission. That parol permission to erect this dam, gave the defendant no right to the land, or to flow the water upon the premises occu-

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pied by the plaintiff. He was at law a mere occupant at will. Mr. Wetherbee or any one under him could have caused the dam to be removed at their pleasure, until the right was confirmed by Wetherbee's deed of June, 1847. *Cook v. Stearns*, 11 Mass. 533. *Hall v. Chaffee*, 13 Vt. 150. But giving to that parol permission, and the erection of the dam under it, its greatest effect, it would create but an equitable right in the defendant, which would be held subservient to the prior and superior equity of the plaintiff, and would give him no right to interfere with, or disturb the plaintiff in the occupancy or possession of his premises. In giving his permission to erect that dam, Mr. Wetherbee obviously did not intend to do any act in derogation of the right he had previously given to the plaintiff, and this must have been so understood by the defendant, for in his defense and in the evidence he introduced, it was insisted, that the dam occasioned the water to flow back only on the land of Mr. Wetherbee, and not on the land in the possession of the plaintiff. This intention and understanding of the parties is confirmed by their subsequent deed of June, 1847. If that deed was given in pursuance of that parol permission, we find, that while it confirms the right to erect and continue that dam, and gives the further right to construct an aqueduct from the dam to the defendant's shop, yet, the right to flow the water back, is expressly limited to the line of Alonzo B. Hough.

Whether, therefore, we look to the several deeds of Mr. Wetherbee to the defendant, of August 18, 1835, and of June 22, 1847, or to the parol permission granted in 1836, the defendant had no right to erect, or continue the erection of the dam, where it is now situated, so as to cause the water of that stream to flow upon the land of the plaintiff. The jury have found, that the dam was erected by the defendant, and that the plaintiff has sustained damages in consequence of its erection, and the flowing of the water back upon his premises. Upon those facts, the plaintiff is entitled to recover such damages as he has sustained from that cause, in being prevented or disturbed in the full enjoyment, and use of the premises in his possession.

The language of the court, in their charge to the jury, that the plaintiff was entitled to recover for *any injury* occasioned to his possession, &c., should be understood with reference to its context, and the facts appearing in the case. It has reference only to such

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damages, as tending to prove which, testimony was introduced on the trial of the case. Under this construction of the charge, we see no matter for which the defendant has cause of exception.

The objection to the competency of Calvin R. Sears, as a witness was properly overruled. The mortgage given to his wife created an interest in the land, which by the marriage might vest in the husband, but at most it was contingent in its character, as the debt might have been satisfied without resorting to the mortgage security. But if he was interested in the event of the suit while they held that mortgage, its assignment to Calvin L. Gilbert removed the objection. The assignment was a valid transfer of the mortgage as against the witness and his wife, and will estop them from claiming the same, as against their deed of assignment. A delivery is presumed, as no fact is stated in the case showing it otherwise. The reassignment of the judgment removed the objection from that source. The assignment of the mortgage and the debt secured thereby to Gilbert, restored the competency of the witness, but they were all circumstances which could properly be taken into consideration as affecting the credibility of the witness.

The judgment of the County Court is affirmed.

SAMUEL TUDOR & PHILO HILLYER v. ASA TAYLOR.

[HEARD AT THE SPECIAL TERM, 1853.]

Petition to vacate the levy of an execution, which had been levied on land not owned by the debtor.

When an execution is levied on real estate, of which the debtor has no title, and the records of the court furnish evidence on their face, that the execution was satisfied by such levy, no proceedings can be had to obtain actual payment of that debt, until the evidence of that apparent satisfaction is removed.

The law upon this subject is settled in *Pratt v. Jones*, 23 Vt, 341, and *Baxter v. Tucker*, 1 D. Chip. 358.

When a levy has been made on premises where the debtor had no title or interest, the creditor may make application to the court to vacate the levy, and this application is addressed to the power of the court to correct its own records, and this power may be lawfully exercised by the court, on petition or motion, accompanied with affidavits and notice.

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And in such a case, if the court had jurisdiction over the subject matter, and the parties in the original suit, they will have power to correct their records, or to grant this summary relief, though the parties should remove from the state after the commencement of the suit, and continue to reside without the state.

And where such a levy had been made, on an execution issued on a judgment, rendered in 1823, on land where the debtor had no title or interest, and the same was suffered to remain in that situation from that time, until the present application on petition to vacate the levy was made, though the parties during all that period, had the same means for enforcing the claim they now have; under these circumstances, *it was held*, that the application to vacate the levy, ought not to be granted, inasmuch as the law will raise a presumption of payment and satisfaction of the judgment, and inasmuch as no circumstances appear in the petition affecting that presumption, and the court dismissed the petition.

THIS was a petition brought to vacate a levy of an execution, which was issued on a judgment rendered by the Supreme Court, at the June Term, 1823. The levy was made in December, 1823, on land where the debtor had no title or interest. The facts in the case sufficiently appear in the opinion of the court.

Washburn & Marsh for petitioners.

The judgment was rendered by this court in 1823, and execution was issued and levied upon land in possession of Horace Hunter, and actually the property of Jabez Hunter. Possession was never taken by the creditors, under the levy, and it has always been held and retained by Hunter, and those claiming under him. The officer's return of the levy shows an apparent satisfaction of record; but there having been no satisfaction in fact, the record, in this respect, is false, and the error may be corrected upon petition.

The power incident to all courts of general jurisdiction, to inquire into the correctness of their own proceedings, to correct their records according to the truth, if erroneously made, or to relieve a party against the unjust operation of a record, on ascertaining, by a direct inquiry into the matter, that the record ought not to have been so made,—and to do this *on motion*, founded on affidavits and notice, was distinctly asserted in *Mosseaux v. Bingham*, 19 Vt. 460, and the case of *Scott v. Stewart*, 5 Vt. 57, was cited as an illustration of its exercise. That the court will, *on motion*, exercise this power, by setting aside an irregular levy of execution, was asserted by WILLIAMS, J., in *Hurlbut v. Mayo*, 1 D. Chip. 390, 391, and in *Peties v. Montague*, decided by this court in

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this county, June Term, 1851,—which was a *petition* to vacate the levy of an execution, for irregularity, which rendered the levy a nullity,—this power was exercised, and the levy was vacated. That case must be decisive of the case at bar.

If the creditors have not a remedy in this form, they are without remedy; for the statute, which has been in force for many years in this state, allowing the creditor to bring *scire facias*, where an execution has been levied upon property not belonging to the debtor, has been repealed. Acts of 1852, p. 7. Comp. Stat. c. 45 § 46.

No objection can be based, by the debtor, upon the lapse of time, since it has been held, in *Baxter v. Tucker*, 1 D. Chip. 353, that the statute of limitations does not apply to any case, “where by the return of the execution, the judgment appears on record to be satisfied,”—and if this were not so, the non-residence within this state, of either the creditors or debtor, since the rendition of the judgment, is a sufficient answer to the objection.

The *dictum* in Co. Lit. 290 b, “that it appeareth by the preamble of the statute, 32 Hen. 8, c. 5, and by divers books, that after a full and perfect execution had by extent returned and of record, there shall never be any re-extent upon any eviction,” is not applicable to this case. For that refers to an extent upon the rents and profits of land, (which is all that the common law, or the statutes giving remedy by *elegit*, by statute merchant or statute staple, allowed,) and not to a levy under the statute of this state, upon the fee. The creditor, under such a levy, is put in possession, and acquires the right to take the rents and profits, while he remains in possession, and does take them. It may, with some show of justice, be said, that having taken an appearance of satisfaction, and some value, he shall not have another extent, and this for the reason given in Bac. Abr. Ex’or D. 1717, where it is said that though the creditor “take but an acre of land in execution, yet it is held a satisfaction of the debt, be it never so great, *because in time it may come out of it* ;” as well as for the reason assigned in *Crawley v. Lidgate*, Cro. Jac. 338, that “the taking of land in extent for the debt is, in judgment of law, as if he had taken a lease for years in satisfaction of the debt.” But how can that be held a “full and perfect execution had by extent,” which passes no title of the debtor to any land, and under

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which the creditor does not acquire even the present possession of land?

This whole question was examined with great care by Ch. J. PARKER, in *Burnham v. Coffin*, 8 N. H. 114, and he arrived at the conclusion, both upon reason and authority, "*that it is by no means clear, that by the common law, the creditor who had extended lands, which did not belong to his debtor, might not have a new extent, before the statute of 32 Hen. 8.*" And in that case the same remedy was afforded by *action of debt*, against a void levy, which this court refused, in that form of action, in *Pratt v. Jones*, 22 Vt. 341,—but afforded, upon *petition* in *Pettes v. Montague*, above cited.

O. P. Chandler for defendant.

I. We say that the court have no jurisdiction. Both parties reside out of this state, and no service was made on defendant within the state.

II. After *thirty* years, the court will presume the debt satisfied, either by levy or otherwise.

If the court have jurisdiction now, the petitioners might at any time have resorted to the same remedy; but if they had not this remedy, they might have proceeded by *scire facias*, in which case the service might have been sufficient, as the court already have jurisdiction of the parties. *Barnes v. Bellnap*, 22 Vt. 419.

The statute, relating to *scire facias*, furnishes a cumulative remedy. The present proceeding might have been taken at any time, if it can now be had. *Pratt v. Jones*, 22 Vt. 345. *Pettes v. Raymond et al.*, (not reported.)

The opinion of the court was delivered by

ISHAM, J. This petition is brought to vacate the levy of an execution. The judgment was rendered in the Supreme Court at the June Term, 1823, and the execution levied on real estate in December, of that year. It is stated in the petition, that the premises, at the time of the attachment and levy, were in the possession of, and owned by Jabez Hunter; that they were never owned, and have never been in the possession of the debtor, or these creditors, since the levy; and that no benefit or advantage therefrom, has ever been or can be realized by them. We are

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satisfied from the evidence accompanying this petition, that the execution was levied upon property not owned by Asa Taylor, and that no title or interest passed to the creditors under that levy ; indeed, it has not been contended in defense, that the levy of the execution has been effectual for any purpose, in producing actual satisfaction of the debt, either at law or in equity. We are, therefore, to take those facts as true, and as satisfactorily proved by the testimony in the case.

The execution having been thus levied, and the records of the court furnishing evidence on their face, that the execution was thereby satisfied, no proceedings can be had to obtain actual payment of that debt, until the evidence of that apparent satisfaction is removed. The action of debt on that judgment cannot be sustained ; neither can it be revived by *scire facias* at common law ; for the defect in the levy is not apparent on its face, but arises from matters in *pais dehors* the record. Before those remedies can be resorted to, proceedings must be instituted, acting directly upon the record itself, vacating that levy and apparent satisfaction ; otherwise, the record evidence of satisfaction will be conclusive, and cannot be contradicted by parol testimony. The cases of *Pratt v. Jones*, 22 Vt. 344, and *Baxter v. Tucker*, 1 D. Chip. 353, must be considered as having settled the law on that subject in this state. See also, *Dimick v. Brooks*, 21 Vt. 578. *Lawrence v. Pond*, 17 Mass. 438. The rule, drawn from the cases on this subject, seems to be this ; that the record must show a legal obligation still subsisting and unsatisfied. If the levy was void and illegal on its face, no satisfaction would appear of record, and those remedies might be resorted to ; but if the levy was apparently good, and the want of actual satisfaction is to be proved by testimony *aliunde*, then those remedies are not available ; and none can be had, until that apparent satisfaction of record is removed. The legislation of this state on this matter is conformable to this view of the subject. In 1797, Slade's Comp. 213, an act was passed, giving a remedy by *scire facias*, when the execution was levied on property *not the debtors* ; and this was considered by CHIPMAN, Ch. J., as a new remedy. In 1837, this remedy was extended to *irregular and informal levies* on real estate, where the title therefrom shall be *deemed doubtful or uncertain*. The act of 1797, and that of 1837, were re-enacted in the Revised Statutes p. 243 § 39, and p. 244

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§ 43. Comp. Stat. p. 315 § 46, 49. These several statutes remained in force until 1852, under the provisions of which, a specific redress was given to creditors by *scire facias*, when a void levy of an execution was made by being extended on real estate, belonging to others, and not the property of the debtor. By the act of 1852, p. 7 § 46 of Chap. 45, of the Comp. Stat. was repealed; thus taking away the remedy of *scire facias*, where the levy was void in consequence of being extended on land not the debtors; so that a remedy by *scire facias*, under the statute, extends only to *irregular and informal levies*, where the title thereby is doubtful; and does not extend to cases where the debtor has no title or interest in the premises on which the levy is made. The result is, that this creditor, and all others like situated, are without remedy by action of debt or *scire facias*, at common law, or under our statutes, and in fact are remediless, unless a remedy can be had in the mode, and under the proceedings now adopted.

The proceeding in this case is not instituted upon any statutory provision, but it is an application, founded upon common law principles, addressed to the power of the court, to correct its own records; a power usually exercised on petition, or motion, accompanied with affidavits and notice. This power has been frequently exercised in this state, and we entertain no doubt that such power lawfully exists, and probably might have been exercised, even when a remedy existed by *scire facias*; for where a remedy exists at common law, and a new remedy is given by statute, the new remedy is merely cumulative, unless negative words are used, or that which is equivalent, taking away the remedy at common law. The exercise of this power was expressly recognized in the case of *Hulbert v. Mayo*, 1 D. Chip. 887; and in *Pettes v. Montague et al.*, in manuscript, decided in Windsor County, in 1851—this power was directly exercised. That case, like this, was a petition to vacate the levy of an execution. The execution had been levied on a portion of mortgaged premises by *metes and bounds*, and therefore void, 11 Vt. 323. The petition was preferred to the county court and dismissed, on the ground that the court had not legal power to grant the relief prayed for; exceptions being taken, this court reversed the judgment and vacated the levy. The same principle was recognized in the case of *Mosseaux v. Brigham*, 19 Vt. 460. The exercise of this power is inherent in all courts of

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general jurisdiction, for the purpose of revising and correcting their own proceedings. In the language of the court in the case last cited, "this power exists to correct their records according to the truth if erroneously made, or to relieve a party against the unjust operation of a record, on ascertaining by a direct inquiry into the matter, that the record ought not have been so made. The proceeding is usually on motion, and the power is exercised in a summary way, whenever the court, in the exercise of a sound discretion, considers that the furtherance of justice requires it."

From the facts existing in this case, and the decisions of this court heretofore made on this subject, we think the plaintiffs are entitled to the relief sought by their petition, unless that relief is barred by lapse of time. It is now nearly 80 years since the levy of the execution, and over that period since the rendition of the judgment. Both of these parties, in the meantime, have resided out of this state. Yet, the remedy to which the plaintiffs have now resorted, was at all times open to them, and was as available at any time heretofore, as now. As the court had ample jurisdiction over the subject matter and parties in the original suit, they are not deprived of the power to correct their records, or grant this summary relief, by the removal of the parties from this state after the commencement of the suit, or by their residence abroad. The parties having once submitted themselves to the jurisdiction of the court in the prosecution of the original action, these proceedings, whether by petition, motion, or *scire facias*, so long as they introduce no new parties on the record, but are confined to the original parties in the suit, are not treated as the commencement of a new suit, but as a continuation of the original action; constituting a necessary part of the original record. 22 Vt. 426. Comp. Stat. 244 § 18.

The right of the petitioners to have this levy vacated, and this apparent satisfaction of the execution removed, is not affected in consequence of the debt or judgment being barred by the statute of limitations. In the case of *Daxter v. Tucker*, before cited, it was held, "that the statute of limitations contemplates only the case of a judgment, which has been suffered to lie dormant eight years, *where no satisfaction appears of record.*" This case is, therefore, removed from the operation of that statute. A more serious question, however, arises from the doctrine of presumption ;

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for there would be no propriety, in striking from this record the evidence of a satisfaction of this judgment, if after all, the law applies to this case the doctrine of a presumptive payment, and satisfaction of this debt.

It is a general rule, that debts of record, and by specialty, which have been unclaimed and without recognition for twenty years, in the absence of explanatory evidence, are presumed to have been paid. A shorter period, with other circumstances tending to prove payment, may go to the jury as evidence of that fact, from which they may make that inference. But after the lapse of twenty years, it then becomes a presumption of law. Mortgages are presumed to be paid; judgments satisfied and discharged; bonds for the payment of money paid and released; as also covenants against incumbrances, warrants to confess judgments, decrees in chancery, statutes, recognisances, and other matters of record. 2 Phil. Evid. 324, note 307. 2 Barn. & Cress. 555. The law raises this presumption as a rule of protection, as a matter of public expediency and for the general good. It is deemed expedient, that claims, opposed by such evidence, as such a lapse of time affords, should not be countenanced; and that society is more benefitted by a refusal to entertain such claims, than by suffering them to be made good by proof. 1 Greenl. Evid. § 32, 39.

This presumption may be rebutted by circumstances, showing that the claim is due and unpaid; but what circumstances will be sufficient for that purpose, it is unnecessary to say, as none are stated in the petition, or referred to in the testimony for that purpose. If a suit was pending at law on that judgment, the presumption of payment would be clear and unquestionable. The same rule prevails in equity; and surely, a rule that has such general application when proceedings are instituted directly to enforce the judgment, should not be overlooked, or disregarded, on applications of this character.

The suit was commenced and prosecuted to final judgment. The creditors prosecuted their claim with diligence in obtaining their judgment, and levying their execution on real estate. It is difficult to believe that a claim of that magnitude would remain from that time, for this long period unclaimed and unrecognized, if it had not been in some way arranged or compromised; when during all that period, they have had the same means for enforc-

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ing the claim they now have. Under these circumstances, we can see no propriety in granting this application, when the law will raise a presumption of payment and satisfaction of the judgment and when no circumstances are stated in the petition affecting that presumption.

The result is, that this petition must be dismissed with costs.

DWIGHT F. FAULKNER v. SAMUEL HEBARD.

Contract. Consideration.

A contract, for the sale of property, which is merely what is termed a refusal of the property by one of the parties, leaving it optional with the other party, whether he will take the property, within a certain time or not, unless upon some other consideration, or under seal, would not be valid in law, for want of consideration.

But where F. and H. entered into a written contract, by the terms of which H., in consideration of a certain number of shares of stock in the Vermont Central Railroad Co., "to be delivered, to me, (H.) by F. on or before the first day of July, 1880," agreed to sell and convey certain property to F., and this contract was signed by both parties—*Held*—that the contract was upon sufficient consideration; and that both parties are bound to do what is specified in the contract to be done on his part; and that if F. had declined to deliver the stock according to the terms of the contract, an action would lie upon the contract, for the refusal.

And in such a contract, the delivery of the stock, and the conveyance of the property are *concurrent acts*; and as the one promise is the entire consideration of the other, neither party would be bound, to absolutely convey his property, except upon the conveyance by the other.

But either party, claiming damages for non-fulfillment of the contract, must either show a readiness, and offer to perform on his part, or that he was excused therefrom by the consent or the conduct of the other party.

The directors of the Railroad Company, by letting in those who paid but \$30, to an equal participation in the profits of the company, with those who paid \$100, lessened the market value of the stock which F. by the contract sold to H.; *it was held*, that if this act of the directors was a legal one, then it was one which H. was bound to know they might do, and would therefore form one of the contingencies of H's. purchase; and whether the act of the directors was before or after the actual time of sale, would no more affect the validity of the sale, than

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any other legal act of theirs; but if the act was an unlawful exercise of authority, by the directors, then H. when he became a stockholder might resist it in any legal way; and therefore will form no defense for H. in a suit for a non-performance of the contract.

ASSUMPSIT, on a special contract which will appear in the statement of the case.

Plea, the general issue, and trial by jury.

On the trial the plaintiff offered in evidence, the contract declared on, of which the following is a copy:

"In consideration of thirty-six shares in the Vermont Central Railroad Co. to be delivered to me by D. F. Faulkner on or before the first day of July next, I do hereby agree to sell to the said D. F. Faulkner, my twelve shares in the East Bethel Factory, together with all my interest in the old machinery, &c. belonging to said mill.

"I also agree to sell D. F. Faulkner my brick dwelling house, formerly belonging to the Factory together with all the land, barns, &c. as formerly deeded to the Factory by Joseph Fowler, rent of the Factory to be paid to Mr. Hebard to April first.

"Possession of the dwelling house to be given to D. F. Faulkner on or before the first day of July next, and possession of the land to be given on the first day of April next.

"East Bethel, March 21, 1850.

D. F. FAULKNER.

(Signed.)

SAMUEL HEBARD."

"Witness—SAMUEL H. HEBARD.

To the admission of the same, the defendant objected on the ground of variance, and also on the ground that it was not mutual, and furnished no evidence of consideration for the promise of defendant.

The court overruled the objections and admitted the paper, to which decision the defendant excepted.

The plaintiff also offered in evidence a letter from defendant, of which the following is a copy:

"East Bethel, March 25, 1850.

"MR. D. F. FAULKNER,

"DEAR SIR:—I am prepared to deed to you the Factory and also the house and premises, &c. You will set 15 shares to Enoch Hebard of Randolph, Orange County, and State of Vermont, and forward the certificate of said fifteen shares in the

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"Vermont Central Railroad. Also the other twenty-one shares
"in Vermont Central Railroad to me Samuel Hebard, of Bethel,
"Windsor County, and State of Vermont, making thirty-six
"shares in the whole; you may send the certificate to Mr. Wedge-
"wood, and we can exchange the writings agreeably to your or-
"der and the contract.

Yours Respectfully,

(Signed,) SAMUEL HEBARD."

This letter was post marked "E. Bethel, Vt.," and directed on
the outside "Dwight F. Faulkner, Esq., Boston, Mass."

The plaintiff also proved, that pursuant to the instructions
therein contained, he obtained the certificate from the proper offi-
cer in due form, of the transfer to Enoch Hebard, of fifteen shares of
the Vermont Central Railroad Co., dated March 28, 1850, and
also a similar certificate of the transfer to the defendant of twenty-
one shares in said stock, which certificates the plaintiff sent to said
Wedgewood, who was in the employ of the plaintiff at Bethel, to
deliver to defendant, and secure a conveyance from defendant to
the plaintiff of the property named in said writing above recited;
and said Wedgewood requested the defendant to make said con-
veyance and receive said certificates, which the defendant declined
doing; for the reason, that before the said contract was made and
said writing executed, the said railroad stock, by the action of said
company by its officers, had been reduced in value from ten to
twenty dollars on each share, and which, at the time of signing
said contract was unknown to the defendant.

The defendant offered evidence tending to prove, that he then
offered to convey back the said stock to the plaintiff. Also evi-
dence tending to prove, that the value of the property named in
said writing, agreed to be conveyed by defendant to the plaintiff,
was worth some \$1,720,00, to wit, the dwelling house and prem-
ises \$1,000, and the factory shares \$720.

That on the day of the making of said agreement and writing,
(which was about five o'clock, P. M. March 21, 1850,) the direc-
tors, of said Railroad Co., at a legal meeting in Boston, holden in
the forenoon of that day, ordered the issuing of fifty thousand
shares of new stock in said company, at thirty dollars per share,
which at once reduced the value of all the stock in said company
to below the sum of thirty dollars per share. That at the time of

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said trade, the plaintiff assured the defendant that the stock in said company was worth over fifty dollars per share, although it had been selling for less.

It appeared in evidence, that up to that time said stock had been selling in market at from forty to fifty dollars per share; that the defendant had never been a stockholder in said company.

The defendant also offered evidence tending to prove, that at the time of said trade, and up to the 26 or 27th day of March, 1850, he was entirely ignorant, and had no suspicions that the said company, or its officers had done or contemplated issuing new stock at reduced prices, or doing any thing the effect of which would be to depreciate the value of said stock, but supposed that said stock was then worth from forty to fifty dollars per share, and that it would have been worth said sum had it not been for the issue of said new stock.

That said contract was made at Bethel; and that the plaintiff then, and for a long time before resided in said Boston. There was no evidence to show, that at the time of making said contract the plaintiff knew that the company had reduced the value of the shares, by issuing the new stock nor was there any evidence tending to prove, that plaintiff knew that said company, or their officers contemplated such a thing.

The court,—PIERPOINT, J., presiding,—decided that said writing was a valid, mutual contract between the parties, and furnished a sufficient consideration for the undertaking on the part of the defendant.

And that unless the plaintiff knew at the time of said trade, that said stock was reduced in value by the action, or contemplated action of said directors, and represented in relation thereto what he knew to be false, which would amount to actual fraud on his part, the plaintiff must recover.

The court also decided, that the plaintiff having transferred the railroad stock, so that the title vested in the defendant, the damages which plaintiff was entitled to recover, if any, was the value of the real estate and the manufacturing stock agreed to be conveyed, by the defendant to the plaintiff, and interest from July 1, 1850.

Thereupon the defendant consented that a verdict be taken for the plaintiff, with leave to except to the ruling of the court in the

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matters aforesaid, and that the court assess the damages, all which was agreed to, and a verdict was accordingly taken for plaintiff, and the court assessed the damages according to their decision.

To the several decisions of the court, the defendant excepted.

Converse & Barrett for defendant.

I. The paper writing was improperly received in evidence, because it does not support the declaration.

II. The contract is not *mutual*. There was no agreement on the part of the plaintiff to convey the 86 shares. The agreement was all on one side. Plaintiff could perform or not as suited his interest, and the defendant could have no remedy on the contract if he neglected to procure the *stock*.

III. If, however, there was a binding agreement on the part of plaintiff, it furnished the consideration only for the sale and transfer of the twelve shares of defendant in the factory, and the old "machinery in the mill." The house and barn was an independent stipulation, not based upon the consideration of the thirty-six shares of railroad stock, and so *clearly* there is no consideration for this agreement on the part of defendant.

IV. Under the proof the plaintiff was not entitled to recover; it was at least, a mutual mistake, or ignorance relative to a fact very seriously affecting the value of the stock, and which justified the defendant in repudiating the contract. *Ketchum v. Cutlin*, 21 Vt. 196. *Gilman v. Pike*, 2 Vt. 576.

No laches can be imputed to the defendant. He made his election as soon as the fact came to his knowledge, and upon being requested by Wedgewood, the plaintiff's agent, to carry into effect the contract. *Wainright v. Webster*, 2 Saund. Pl. 674. 9 M. & W. 53.

The letter of the defendant to the plaintiff, was written before defendant had any knowledge of the reduction of the value of the stock. The depreciation of the stock, by the action of the directors had taken place before the contract was made; the latter being done at five o'clock, P. M., and the former on the forenoon of the same day.

It cannot be pretended that the defendant would have entered into the contract had he known the facts. Nor could he be charged with neglect or want of attention in making proper inquiry about

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them. Thus defendant is brought within the principle of the decided cases above cited.

A. P. Hunton for plaintiff.

I. The title to the railroad stock did not vest in the defendant, because he did not accept or receive the certificates. And as to fifteen of them, for the further reason that the certificate was made in the name of Enoch Hebard. The title of these did not pass to him, because he was not a party to the contract and did not accept the certificate.

If the defendant had accepted the certificates or offered to receive them, and refused to convey the property, it would not have vested the shares in him.

But if the legal title did vest in the defendant, or the defendant and E. Hebard, they hold the same merely as trustees for the plaintiff; hence no beneficial interest in them, and are bound to reconvey on demand.

And the fact that they have the strict legal title, if it exists, should not be taken into the account in estimating the damages.

II. The contract is properly described in the declaration. It was made on good consideration. And there was no fraud on the part of the plaintiff.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. We have spent no time upon the question of variances between the declaration, and the contract, since the defendant's counsel admit, that one of the counts in the declaration is unobjectionable on that ground, and more perhaps, if the contract is construed to contain mutual promises, which is the next point made. If one count is good in this respect it is sufficient.

II. We think the contract is something more than what is termed a mere refusal of the property by defendant, leaving it optional with plaintiff, whether he will take the property, within a certain time or not. Such a contract, unless upon some other consideration, or under seal, would probably not be regarded, as valid, in law, for want of consideration. But it was intended, by the parties to this contract, as appears by its very terms, to have it upon consideration. And it seems to us, that the contract, in terms, con-

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tains a stipulation, on the part of the plaintiff, to deliver the stock, by the first of July, 1850. And that if he had declined doing so, an action would lie upon the contract, for the refusal to do so. The terms are, "to be delivered, to me, by D. F. Faulkner on or before the first day of July next," and this is signed by both parties. We think the intention of the parties was, that both parties should be bound to do what is specified in the contract to be done on his part.

III. But, by the terms of the contract, as it seems to us, the delivery of the stock, and the conveyance of the property, stipulated to be conveyed, on the part of the defendant, were to be *concurrent acts*. And although the plaintiff by the terms of the contract, was first to move in the premises, so far as to manifest a readiness to convey, we do not deem it reasonable, inasmuch as the one promise is the entire consideration of the other, to hold, that either party was bound to absolutely convey his property, except upon the conveyances, by the other. The import of the contract is, that each shall convey to the other, at the same time, but the plaintiff has the privilege of naming any time, before the first day of July next, and if he do not, it shall be done upon that day. In regard to this class of contracts, it is a settled rule, that neither is obliged to convey absolutely, if the other declines conveying, on his part. The other party is then restricted to his remedy in damages. But the party claiming damages must either show a readiness, and offer to perform on his part, or else that he was excused therefrom, by the consent or conduct of the other party. We conclude, therefore, that the plaintiff was not bound absolutely to part with his property, except upon the receipt of a conveyance from defendant. Such a rule of construction would make the contract unequal and unjust and we ought not to give the contract such a construction, unless its terms so clearly speak, which is not the case.

The plaintiff then, as it seems to us, was not bound to part with the title of his stock unless he obtained the stipulated pay. It was not a case of credit, or independent promise on either part. And the proof does not show any consent by plaintiff to part with the title of the stock, or of the defendant to receive it. Wedgewood, the person to whom the certificates were sent, was at most a mere stakeholder, or agent for both parties, but strictly he was the plain-

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tiff's agent, and evidently so viewed by both parties; and therefore although the stock was on the company books transferred to the names of defendant and his agent, still there was no such actual delivery to defendant, as would vest any legal property in him in his own right. The most that could be claimed would be that the plaintiff having done this, by defendant's direction, might, at his election, treat the title of the stock, as having passed to defendant. But I think this even will not follow, from what was done. The plaintiff then was entitled to recover, if at all, the difference between the value of the stock at the time, and the property stipulated to be conveyed by defendant, and the judgment must at all events be reversed for this cause.

IV. But the important question in this case is, whether the plaintiff can recover at all. The finding of the jury negatives all fraud or intentional misrepresentation, on the part of the plaintiff, or even knowledge of the circumstance, which it is claimed should exonerate the defendant from his contract. The only question, then is, whether the parties were under such a mutual misapprehension, in regard to the actual state of the subject matter of the contract, at the time of entering into it, as will relieve the defendant from the obligation of it. This is a familiar ground of relief from the performance of contracts in a court of equity, and as a general thing confined mainly to that forum. But in some few cases it has been allowed, as a defense, at law. The case of *Ketchum v. Catlin*, 21 Vt. 191, has perhaps gone to the full extent of such relief, in a court of law, and may be regarded as laying down the law, as it now stands, in regard to defense at law to contracts, on the ground of mutual misunderstanding in regard to the state of the subject matter at the time. And this case goes upon the ground, that to constitute a defense at law such subject matter must be so changed, at the time of the contract, without the knowledge of either party, as not in any sense to answer the purpose, for which the contract was made. This mode of defense goes upon the ground, that if the party buys one thing, or a thing, in one state, he is not bound to accept of a different thing, or the same thing, in a different state. If property is sold, as being in existence and in fact has been destroyed, or changed state, the sale will be inoperative.

But any accidental occurrence, not directly affecting the state

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or quality of the thing sold, but only its market value, will have no such effect. News of peace or war, or commercial restrictions, or the repeal of such restrictions, or their modification, has often a most surprising effect upon the market value of commodities, but whether both parties, or one only, is ignorant of such facts, which renders the matter more unjust and unequal, is no ground of relief even in equity, unless the one party gaining the advantage, is guilty of artifice, or misrepresentation. The rule of the civil law was somewhat different and more in accordance with the rule of moral justice and equity, than that of common law. This has been with some writers a ground of reproach to the common law, as being less in accordance, with the principle of christian morality, than the law of pagan Greece and Rome. But the case put in *Cicero de officiis* is of this character, where the two cargoes of corn coming into Rhodes, in time of famine, or great want, and the one first reaching port, knowing of the near approach of the other, with a large supply, the question is whether the first is bound, before he sells his cargo, to make known the probable early arrival of the other? The Roman casuist decides that he is, and so must a christian moralist; but the common law will not allow any such determination, in a civil tribunal!

So too, stocks may be affected, by general legislation, by the granting of other charters, by governmental negotiations, by war, or peace, by the management of the corporations, by the result of an election, by the death of an important financial agent, and by a thousand other accidental matters. The question is, whether such mere accidents, not affecting the inherent quality of the stocks or essentially their actual value, can be said to create such a change of state, as to justify the vendee in refusing to go forward with his contract. I have not been able to find any such case, and the books are filled with those of an opposite character.

Had this vote of the directors cancelled, or annihilated the stock, it would no doubt have been a good ground of defense to this action, within the principle of the best considered cases upon the subject. But so far from that, it did not affect the stock in any sense, except incidentally, by its increase at a low rate. This had three accidental effects upon all the stock of the company. 1st. It showed the company to be embarrassed, if not desperate, which of itself had a tendency to lessen the market value of the stock,

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but not its real value. 2d. It showed the probable opinion of the directors that the stock was not worth much above \$30, which would have a similar effect. 3d. If it was a legal act it did tend to lessen in some degree the actual value of the stock, by letting in those who paid but \$30, to an equal participation in the profits of the company, with those who paid \$100. But if this was a legal act it was one, which the defendant was bound to know the directors might do, and which would therefore form one of the contingencies of his purchase, and which, whether done before or after the actual time of sale, could no more affect the validity of the sale, than any other legal act of the directors. If the act was an unlawful exercise of authority, by the directors, the defendant when he became a stockholder might resist it, in any legal way.

The length of time given the plaintiff to deliver the stock must have involved the hazard of the directors doing many things, which might affect the stock, and indeed, every legal act certainly, and illegal acts would not bind the stockholders. We do not see how this will form any defense to the suit, there being no fraud or misrepresentation.

Judgment reversed, and case remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORANGE.
MARCH TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

BENJAMIN B. MUSSEY & OTHERS v. MORRILLO NOTES & C.
P. BALDWIN.

Assignments. Construction of.

A deed of assignment by a debtor for the benefit of creditors thus specified the powers of the assignees. They "shall forthwith take possession of the same, and faithfully, and as soon as practicable, and in the most beneficial manner, dispose of and convert into money the said real and personal estate, and collect the said choses in action, and apply the money therefrom arising (after paying expenses,) in payment, and discharge the debts due the assignees, and for which they are holden as sureties, and pay the surplus to Low, (the assignor,) or to such persons as he shall appoint,"—*Held*—

I. That this did not give the assignees power to sell on credit, nor

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II. Power to compound with the debtors.

III. That it did not involve a violation of the statute against fraudulent conveyances, nor

IV. A violation of the statute of 1843, against *general assignments* for the benefit of creditors.

The characteristics which must determine whether an assignment is general or special.

TRESPASS for taking and carrying away certain articles of personal property.

Plea, *not guilty* and trial by jury.

On the trial the plaintiffs read in evidence the written assignment of one Asa Low, and proved the execution and delivery of the same; and also offered evidence tending to prove that at the time of the delivery of said assignment, said Low was indebted to the assignees in about the sum of forty thousand dollars, and the amount which the assignment was next made to secure was about the sum of forty thousand dollars, and it was conceded, that the debts mentioned and described in said assignment, were truly stated therein; and the plaintiffs further proved, that at the time of the delivery of said assignment, said Low was the owner of other property, not included in said assignment, consisting of some land and personal property, but mostly of debts due to him, to a large amount, exceeding fifteen thousand dollars in value; that on the execution and delivery of said assignment, the plaintiffs, as assignees, took possession of all the property therein named, and procured an inventory and appraisal to be made thereof, and held exclusive possession and control thereof, and proceeded to dispose thereof, as fast as could prudently be done, and in less than ten months sold all of the same, except that taken by the defendants, and with the avails, paid, agreeably to said assignment, an amount over eighty-four thousand dollars; that while the plaintiffs were thus in possession of, and disposing of said property, in April, 1852, the defendants took and carried away the property in the declaration mentioned; and that the said assignees have not yet been paid the debts due them from said Low.

The defendants gave testimony to prove, that at the time of the making of said assignments, said Low was indebted to the defend-

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ant, Noyes, in the sum of about three thousand dollars, and that said Noyes sued out an attachment on said debt, in due form of law, and the same was by his direction, served by the defendant, Baldwin, as deputy sheriff, by attaching the property in plaintiffs' declaration mentioned, as the property of said Low; that said attachment was duly returned and entered in court, and is still pending.

The defendants also offered evidence tending to prove, that said assignment was fraudulent in fact, as to the creditors of said Low.

The plaintiffs also offered evidence tending to prove, that said assignment was not fraudulent, but in good faith, and there was testimony tending to show that said Low, at the time of said assignment, was in failing circumstances, and unable to pay his debts, and it appeared in proof, among other things, that the assignees, after taking possession of the property named in the assignment, continued to run the paper mill, for the purpose of running out the stock on hand, and that they also purchased some stock, which they worked, that was not necessary for working that off on hand; but it also appeared, that immediately after the assignees had so taken possession of the property, they called a meeting of the creditors of Low, and that that meeting was held and was very generally attended, and among others by an attorney of defendant, Noyes, and the different modes of managing and disposing of the property were fully discussed and talked over; and that with the assent, and by the advice of the creditors, the assignees run the mill as they did, and as is above stated, both for the purpose of working up the paper mill stock then on hand, and for the purpose of aiding in the disposal of the stock of goods then on hand in the store.

It also appeared, that most of the personal property was sold at auction, and in making sales, and whenever it was desired, a credit was given, which was generally the case.

It also appeared, that such sales were made on credit, under the advice, and with the consent of the creditors of said Low, for the reason that it was customary to make such sales on credit in the country, and that thereby the property could be disposed of at higher prices; and it also appeared that the assignees had not lost, or failed to collect the avails of any sale thus made on credit.

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It also appeared, that at the time of causing the assignment to be recorded in the town clerk's office, one of the assignees, B. B. Mussey, caused a suit to be commenced against said Low, in the name of Stearns, upon a note of over \$25,000, held by said Mussey against said Low, and caused to be attached thereon a portion of the property of said Low, other than the debts due to him, which was not included in said assignment, being a quantity of wood, &c., of the value of about \$500, and also caused a return to be made on said writ, attaching all of said assigned property which was in Bradford, and could be attached by a copy in the town clerk's office, under the statute. But it appeared, that said Mussey was a resident of Boston, and was a creditor of said Low, to the amount of some \$88,000, and that he was induced to commence this suit as a matter of precaution, having doubts what construction would be given by the courts of Vermont, to the statute of 1843, in respect to general assignments, and it appeared that said suit was still pending. But upon the trial no question was made or reserved by the defendants, upon any of the above facts, except so far as they were claimed to have a legal tendency to prove that the assignment was fraudulent, *in fact*, in respect to the creditors of said Low. And in that respect the court gave to the jury full instructions, both as to the general rules of law in respect to fraud in fact, and in respect to the particular application of those rules to the above facts, to all which no exception was taken.

The defendants requested the court to charge the jury, that said assignment was void as to the creditors of said Low, and that the plaintiffs could not recover.

The court,—COLLAMER, J., presiding,—declined so to charge, but charged the jury to find for the plaintiffs, unless they found the assignment fraudulent in fact, giving to the jury instructions as to fraud in fact, to which part of the charge there was no exception. But to the decision of the court, declining to hold said assignment void, the defendants excepted.

The jury returned a verdict for the plaintiffs.

L. B. Peck and *W. W. Peck* for defendants.

I. The assignment to the plaintiffs is void under the statute of frauds. Comp. Stat.

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This act is in substance a re-enactment of 13 Eliz. chap. 5, and the latter is a mere declaration of the common law; at common law, and under this act, an assignment made by a debtor under insolvent circumstances, for the benefit of creditors, is void if it creates a trust in favor of the debtor, or empowers the assignees to sell on credit.

II. The present assignment creates such a trust. The conveyances were intended to subserve different interests, are to different parties, between whom there is no privity of contract, and are several and successive. Moreover the instruments on their faces indicate that they are independent of each other. *U. States v. Hooe et al.*, 3 Cranch 78. *U. States v. McClellen et al.*, 3 Sumn. 845. *Dana, Admr. v. Lull*, 17 Vt. 390.

If the assignment is otherwise bad, it is not aided by the fact, that the assignee is a creditor.

III. The assignment empowers the assignees to sell on credit. *Hyslop v. Clarke*, 14 Johns. 458. *Riggs v. Murray*, 2 Johns. Ch. 565. *Austin v. Bell*, 20 Johns. 442. *Meacham v. Stearns*, 9 Paige. *Strong v. Skinner*, 4 Barb. 546. *Barney v. Griffin*, 2 Comst. 365. *Seaving v. Brinckerhoff*, 5 Johns. Ch. 325. 6 Barb. 981. 9 Barb. 255. 6 Hill 438. 11 Wend. 187. 21 Pick. 185.

IV. The assignments are void under the act of 1843, as a general assignment. 3 Sumn. 345. 3 Cranch 78, before cited.

Converse & Barrett and *Washburn & Marsh* for plaintiffs.

There is no error in the ruling of the court below.

I. If the instrument objected to in the court below, and admitted by the court, is to be divided into distinct parts, and considered as separate and distinct stipulations or contracts, then the plaintiffs insist that the first paper is a simple *pledge* of the property named, to the plaintiffs, with authority to sell the same. *Fletcher v. Howard*, 2 Aik. 115.

II. If not technically a "*pledge*," it is a mortgage, with authority to sell and pay themselves. *Leitch v. Hollister*, 4 Comstock 211. If either a *pledge* or a *mortgage*, the plaintiffs had a lien upon the property, at least till their debts were satisfied. *Wood v. Dudley*, 8 Vt. 430. *Hutchins v. Gilchrist*, 23 Vt. 88.

III. That a debtor has a right by law to *pledge* or mortgage personal property to a creditor, as security, if done in good faith,

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does not admit of a doubt. *D'Armay v. Cheseman*, 13 M. & W. 795. 8 N. H. 347. 13 N. H. 298.

The amount of property pledged or mortgaged, whether the whole or part of the debtor's property, can make no difference, provided it is *bona fide*.

That thereby other creditors are prevented from attaching it, cannot make it fraudulent; as a debtor has a right to prefer creditors, and creditors have a right to be preferred. 4 Comstock 211. 6 Mass. 339. 17 Vt. 310.

The amount of property pledged or mortgaged, being disproportionate to the debt secured, thereby can only furnish evidence of *fraud in fact*. It is simply a badge of fraud *per se*. 13 M. & W. 795.

The balance remaining in the hands of the pledgee or mortgagee, can be reached by other creditors. 6 Mass. 339. 4 Comstock 211.

IV. If this surplus or balance could be reached by the creditors of the debtor, it must be because it belongs to the debtor, and he could recover it. It is then, such right or interest, or property as the debtor could assign, sell or dispose of himself, and a transfer of such interest or property, by the debtor *bona fide*, to any other creditor, must be valid and legal.

V. It may, however, be contended that the document in question, is a technical "*assignment*." If such is its legal character, we insist the decision of the court below is none the less correct.

The plaintiffs had a lien on the property till their debts were satisfied, at least, call the transfer by whatever name you please, the jury having found there was no fraud *in fact*.

But if an "*assignment*," it is such by virtue of the accompanying papers. All these papers being cotemporaneous in their execution and delivery, and relating to the same subject matter, must be construed together in determining the character of the transaction. *Holbrook v. Finney*, 4 Mass. 556.

In this view of the case, there can be no legal objection to it as a technical "*assignment*."

The jury having negatived all *fraud in fact*, there can be no *legal fraud*. 6 Mass. 339. 17 Vt. 310.

(1.) Because, the assignment, being to creditors themselves,

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for the security of their claims, as well as those of other creditors, no legal fraud attaches. 23 Vt. 82.

If the debts due the assignees are made a mere *cloak*, to cover the property of the assignor, and keep it from his creditors, such would be fraudulent *in fact*. It must be a question to the jury.

(2.) The assignment is every way unexceptionable, though it had been to trustees and not to creditors. It appropriates the entire property assigned to the payment of his debts. 6 Mass. 339. 17 Vt. 310.

There is no reservation to the assignor of any interest in, or benefit from the same, till all his debts are paid.

No resulting trust.

(3.) It is in no way obnoxious to the statute of 1843, against general assignments. 8 N. H. 347. 8 N. H. 536. 13 N. H. 298.

The opinion of the court was delivered by

REDFIELD, Ch. J. This was a case involving the validity of a general trust assignment for the benefit of creditors. The property assigned amounted to more than \$80,000. The facts necessary to the understanding of the case will appear in the course of the opinion.

I. It is objected that the assignment is void, by reason of the assignees having power to sell on credit. Their powers are thus specified in the deed of assignment: "Shall forthwith take possession of the same, and shall faithfully, and as soon as practicable, and in the most beneficial manner, dispose of, and convert into money, the said real and personal estate, and collect the said choses in action, and apply the money therefrom arising, (after paying expenses) in payment and discharge of the debts due the assignees, and for which they are holden as sureties, and pay the surplus to Low, (the assignor,) or to such persons as he shall appoint." This is the effective part of the deed in the first part. The second part names certain sureties of the assignor to be next indemnified; then three schedules of creditors who were to take the surplus, or a ratable portion, as the case may be, in succession; and if any surplus still remains, it is appointed to go to all the assignor's creditors ratably.

Now, the words used in this instrument, "to convert into money, as soon as practicable, and in the most beneficial manner,"

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would more naturally exclude the power of selling on credit, and especially where such a power was regarded as illegal. We must, to be reasonable, conclude the parties, by these general terms, intended a disposition of the property in good faith, and according to law; and for the faithful execution of such a trust the assignee is always liable to be called into a court of equity, at the instance of the *cestui que trust*; so that it cannot be argued with success, that these general terms confer upon the assignees an unlimited and irresponsible discretion to sell on credit, or not, and so virtually include such a power. We think such a power is neither expressly nor impliedly given; and the fact that such a course was pursued by the assignees, on their own responsibility, and by what they regarded as the consent of those interested, certainly cannot be taken for the practical construction of the contract, by the parties; for the very means the assignees adopted, in assembling the creditors to obtain their assent to the course, shows that they, and all concerned, understood they were departing from the terms and legal force of the assignment. *Meacham v. Stearns*, 9 Paige 398, is an express decision in favor of the above view; and if the New York courts, as is said, have recently adopted the opposite view, we can only say that, to us, the former determination seems the only sound and rational one.*

2. It is claimed that the deed of assignment contained a power to compound with the creditors, and so was void, upon that ground. But we find no such powers in the deed, unless it is to be inferred from the provision that the several creditors named in the schedules, should receive so much of the indebtedness of the assignor to them, as should appear to be due, "upon examination and settlement thereof." But this, it seems to us, can fairly import nothing more than the amount of their several debts. If any claim was at all of an unliquidated character, it could scarcely be described in more definite terms. We might content ourselves here; but as considerable discussion has been had at the bar upon the effect of such powers being contained in such a deed of as-

* NOTE.—The New York courts have finally, since the decision of this case, receded from their former ground, and now hold that an implied power to sell on credit, does not avoid the assignment, and have really assumed the same ground we do here. *Kellogg v. Blawson*, N. Y. Court of Appeals, Nov. 1854.

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signment, it may be proper to add, that, in our opinion, if the power to sell on credit is to be understood as conveying with it the power to keep the business of the assignor for any time, and to any extent, on foot for his benefit, and measurably under his control, so that the effect of the assignment would be to create the assignee, the agent and trustee of the assignor, it would be altogether inadmissible, as was held by this court in *Dana v. Lull*, 17 Vt. 390, and in *Britnell v. Warren & Trustees*, Windsor Co. March, 1851. It is quite likely an express power to sell on credit should be held, in all cases to invalidate such an assignment, as an attempt to define and extend the power of the assignee, in particulars which should be referred to the exigency of circumstances, and the general equitable responsibility of such trustees. I should certainly, without more examination, incline to that opinion. This is undoubtedly the law of the state of New York, and I should not be inclined, at present, to question its soundness as to express power to sell on credit.

In regard to the power of agreeing with the creditors upon the amount due them, which is all that is here given the assignee, I do not myself, at present, perceive any possible objection to it, since it must be exercised in good faith, and with prudence and discretion, and the manner of the exercise approved by a court of equity. But if we are to understand, by compounding with the creditors, the conferring upon the assignee the power to buy up the debts which are confessedly due, for the benefit of the assignor, and upon the most favorable terms, it would certainly be as objectionable as any conceivable power or discretion to be reposed in the trustee, and would make him effectually the mere agent of the debtor. Such an arrangement would prove a most successful device to lock up one's property from creditors, and effectually put them at defiance, while the debtor held the beneficial use of the property.

3. We have found no difficulty with this case, as involving any violation of the general statute against fraudulent conveyances; and this, we think, must be the result equally, whether we treat the instrument as only conveying to the assignees a reasonable amount of the debtor's property, to secure them what he owed them, and what they were holden ultimately to pay; or whether we regard it as a general trust assignment for certain preferred cred-

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itors, by classes, and ultimately for all the creditors, with an express stipulation to pay the balance to the assignor. Viewed in either light it is but the common case of allowing a debtor, in failing circumstances, to make preferences among his creditors; and this right, notwithstanding this statute, is too well settled to be now called in question. The assignment of a reasonable amount of one's property directly to one's creditors, as security, is not essentially different from any other mortgage or pledge of personal property, which does always put the property beyond the reach of attachment in the ordinary mode. *Smith v. Niles*, 20 Vt. 315. But the right to make such an assignment is most unquestionable. (*Tompkins v. Wheeler*, 16 Peters 106; *Adams v. Blodgett*, 2 Wood & Minott 233; *Leitel v. Hollister*, 4 Comstock 211.) Assignments made directly to the creditors, so as to require them to name the trustee, and thus make him their man, instead of his being, as is too often the case, the mere creature of the assignor, are certainly entitled to the most favorable consideration of the courts.

We think, after careful examination of the papers executed in this case, and diligent comparison with the reported cases, that all the papers executed on the same day, and to effect the same general design, must be regarded as one transaction, one contract. The two principal deeds refer to each other, both antecedently and subsequently, and are obviously connected, and each but the complement of the other, as obviously as the two parts of scissors, or any other mechanical instrument, and each, without the other, is as manifestly imperfect, if not useless.

The important inquiry then arises, whether this assignment is void, under the statute of 1843. The statute is in these terms: "All general assignments hereafter made by debtors, for the benefit of creditors, shall be null and void, as against the debtors of such creditors." We think this undoubtedly refers to trust assignments, and not to an assignment directly to the creditors; for the expression, "for the benefit of creditors," seems to imply this; and, at first, I was half inclined to believe that one portion of this assignment—that which was for the security of the assignees themselves—under the peculiar circumstances of this case, might be saved from the operation of the statute, on that ground alone, as it undeniably might, if it stood alone. But further examination

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and reflection satisfies me that, to be consistent with general principles, we must hold the entire contract good or bad, in the gross—at least so far as a statutory prohibition is concerned. This is certainly the general rule in regard to all illegality in a contract; and the decided cases upon this very point seem to me too explicit to admit of much question. *Riggs v. Murray*, (2 Johns. Ch. R., 565,) a case involving a very large amount of property, and, consequently, having received the fullest consideration, seems altogether in point, upon the question, whether that portion of the assignment giving the assignees security first, for their own debts and those for which they are liable, can stand, if the whole contract should be regarded as coming within the prohibition of the statute. It is the very case almost, *nomine mutato*. So, also, is the case of *Hyslop v. Clarke*, (14 Johns. 458.) Any number of cases, involving the same general principle, may be readily found. We shall here only refer to *Wakeman v. Grover*, 4 Paige 24; *Ames v. Blunt*, 5 Paige 13; *Pratt v. Adams*, 7 Paige 615, which are upon the subject of assignments in trust for creditors, and directly in point, to show that such contracts, where in some points they contravene the express provisions of a statute, must be regarded as wholly void.

We come, then, directly to the question how far this assignment is to be regarded as within the prohibition of the statute of 1843. We have before intimated that this assignment, taken as a whole, must be considered as in trust, for the benefit of creditors, within the terms of the statute. The only remaining question, then, will be whether this is a "general assignment." As was said by BENNETT, J., in *Dana v. Lull*, 17 Vt. 390, an assignment of all one's property, for the benefit of all one's creditors; is clearly a *general assignment*. How much less will amount to that, seems not well settled. The term general, as applied to assignments, does not have reference, probably, so much to the proportion of creditors as to the proportion of property. A late work upon this subject, of some accuracy and thoroughness, (Burrill on Assignments,) lays down the rule, as to the number of creditors, thus: "A general assignment is understood to import a provision for a considerable number of creditors, or, at least for several, or more than one," and refers to *Bourchand v. Dias*, where a trust assignment, for the benefit of one creditor, was held not to come within the act

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of Congress which we shall refer to hereafter. We may conclude then, that if a majority of the creditors are provided for, and all the property is assigned, the assignment is still general.

The great difficulty is, to know what proportion of property, less than the whole, shall still denominate the assignment general. The case of *The United States v. Hooe*, 3 Cranch 78, has been referred to upon this point; and it must be admitted, it is, in some respects, analogous. But the differences in the two statutes are considerable. In the act of Congress it is provided, that the United States' priority of lien, or right, shall attach where a debtor, "*not having sufficient property* to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his creditors." This, in terms, seems to confine the assignment to *all the property*. "Thereof," must refer to all the property which the debtor had, "*not having sufficient* to pay all his debts." And so the U. S. Supreme Court held. Chief Justice MARSHALL, however, says, even in such a case, "If a trivial portion of an estate should be left out, for the purpose of evading the statute, it would be considered a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance." But in the case then before the court, the assignment was, most obviously, but a partial one, the debtor retaining enough property to proceed with his business, and actually continuing it for nearly a year, and until his death. But when the great bulk of one's estate is assigned, and his entire business is closed up, at once, by the assignment, it becomes a difficult question to determine how much and what property shall be excepted out of the assignment, to render it not general, but partial. And if the law has fixed no definite rule upon this subject—and I can find none—it will have to be submitted ultimately, in some form, to a jury, as matter of fact, under proper instructions, as all such questions are which depend upon variation in the facts and circumstances, until the law, shall be able to fix some definite criterion, which is not probable in this case, although it is well known that such is now the case upon many subjects which were formerly matters of fact for the jury; for instance, the time of giving notice of the dishonor of a bill or note. A case like *United States v. Hooe*, is clearly a partial assignment; and one which includes all one's attachable property, and which is intended to close up one's business, and does so, at once, is clearly a general

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assignment. The difficulty is in the intermediate cases. The cases in the United States courts, many of which are referred to in a note to *United States v. Fisher*, 1 Peter's Cond. 430, seem to require that an assignment to come within the act of Congress, must include all the debtor's property; and many of the cases in the Circuit court upon this subject, as *United States v. Clark*, 1 Paine 629, seem to regard this as the proper definition of a general assignment; and in one sense it is undoubtedly. A general assignment must include, *substantially*, all a man's property; and a partial assignment must omit some *substantial portion* of the property, and cannot be made to rest upon a mere *colorable omission*.

But, to begin with the subject at the beginning, an assignment which, like the present, on its face, purports to be but a partial assignment, is so to be regarded and treated until the contrary be shown. (*United States v. Howland*, 4 Wheaton 108; *U. S. v. Longton*, 5 Mason 280; *Wilkes v. Ferris*, 5 Johns. 335; *Rundlett v. Dole*, 10 New Hamp. 458, 471; *Driscoll v. Fish*, 21 Pick. 503.) We do not perceive why this rule is not as applicable to the case before us as to assignments under which the United States attempt to assert their priority, under the acts of Congress of 1797-1799. In both cases it may be said the assignors have a motive not to bring the assignment within the statute, and so will be likely to adopt terms of exclusion; but that is equally true of many other legal requisites, and of almost all prohibitions in regard to contracts; and still it has always been held as one cardinal rule of construing contracts, even in regard to statutory requisites—positive or negative—so to expound them that they may be upheld, when that can fairly be done.

Applying this rule to the present case, it resolves itself into a question of an attempt to evade the statute; for the deed, in terms, recites that this is the purpose of its execution, to devote a portion of the debtor's property to the payment and security of "certain specified debts, and the other debts due from him." If this purpose is *bona fide* carried out in the instrument, then the transaction is what it purports to be, a *partial* assignment of the debtor's property, and not a *general* assignment. As no question of this kind was raised in the court below, it could not have been expected the court would charge with reference to it. Such a course, where

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no testimony was offered upon the point, would itself have been error. We might, therefore, content ourselves, and affirm the judgment at this point, since the charge, upon the face of the instrument—there being no attempt to impeach its *bona fide* character—was undoubtedly correct.

But it is no doubt competent for such creditors as choose not to come in under the assignment, always to raise the question whether an assignment claiming to be *partial* is not, in fact, *general*, and to give evidence to show such fact, which, under proper instructions, is to be submitted to the jury; and it may be proper to state here, the elements which must determine such issue.

I. It would not be enough to impeach the assignment as a *partial* one, that it was made such to evade the statute against general assignments, and that but for that statute, none of the property would have probably been omitted; for it was to have been expected, and was commendable in the parties, to conform to the existing law, although aiming to go to the utmost verge of its indulgence, and evidently disposed to go further, in that direction, but for the law.

2. The question is, did the debtor, in fact, make a *general* assignment, although denominating it a *partial* one? For this purpose it is not needful the assignment should include absolutely *all* the debtor's property, but it should be *substantially* all; so that, for the purpose of continuing his business, or paying his debts, or future subsistence, he might just about as well have included the part omitted.

3. The question will have to be determined by the jury, then, in the exercise of a wise discretion with reference to the relative amount of the property omitted, to the debtor's whole property, and the character of that omitted.

4. If the property omitted was insignificant in amount, with reference to the whole, or if it was mainly beyond the reach of process, or exempt from process, or of such a character as not readily to be made available, either to the creditors or to the debtor, and the great mass of the debtor's available property which constituted the basis of his business operations, and which could alone form any reliance to himself for support, or to his creditors for payment, was included in the deed, the deed should undoubtedly be regarded as a general assignment, within the mischief intended to

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be remedied by the statute. Short of this, the assignment, being in terms partial, should not be regarded as made in bad faith toward the statute. No question of this kind was raised, or probably could have been, with much propriety, when so large a sum as fifteen or twenty thousand dollars was omitted.

The judgment is affirmed.

NOTE.—In the course of the examination of that part of the assignment which is made directly to certain creditors, for their own security, we entertained no doubt that such assignments are not within the mischief of the statute; certainly not, unless the bulk of the creditors are included, and *substantially* all the property; and we should have been prepared to uphold that part of the assignment, upon that ground alone, had not the other portion of the assignment converted the whole into a trust assignment, for the benefit of other creditors, and ultimately of all the creditors.

NOAH MARTIN v. EAMES & BELLOWS.

Book Account. Conditional Sale.

Where property is sold conditionally, and payments are made for it by way of services, the services may be charged on book to await their subsequent application; and if the property so sold is received back by the vendor, the vendee may recover for his services in an action on book, if no application has been made of the services. It was so held in *Stone v. Pulsifer*, 16 Vt. 428.

And where the defendants sold conditionally a yoke of oxen to the plaintiff, the oxen to be the property of the defendants until paid for, and by the terms of the trade plaintiff was to pay for the oxen by cutting and drawing a quantity of cord wood, and before plaintiff had drawn all of the wood, he permitted the oxen to go into the hands of the defendants on a loan for a few days, and when plaintiff called for the oxen, the defendants refused to re-deliver them, unless the plaintiff would procure additional security for the payment of the price—*Held*—under these circumstances, that the refusal to re-deliver the oxen was a disaffirmance of the contract and an assertion of their right to the cattle, and that the plaintiff was entitled to recover for the wood delivered to defendants, no application having been made of the same.

After such demand and refusal to re-deliver the oxen, an attachment of the oxen as the property of the plaintiff, the vendee, cannot effect the case, as he had then no property or interest in the cattle that could be attached; such an attachment would, therefore, be a violation of the right of the defendants, the vendors.

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BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported substantially the following facts :

That plaintiff presented the following account :

" 1851 & 1852. } Dec. & Jany.	To drawing out and chopping 70 cords	
	of wood at \$1,25,	\$87,50
	" two days work making road,	3,00
	" two bags at 28 cts.,	56
	" three bushels meal at 50 cts.,	1,50
		<hr/> \$92,56 "

That the defendants presented their account amounting to \$2,98 concerning which there was no dispute.

The auditor disallowed the *second*, *third* and *fourth* items in the plaintiff's account ; and in relation to the *first* item found, that at the time of the deal embraced in their respective accounts, the parties resided in the state of New Hampshire, that defendants still reside there, but that the plaintiff moved in April, 1852, to Bradford, in this state, where he since and now resides.

That some time previous to January 1852, the defendants entered into a contract with the Atlantic and St. Lawrence Railroad Co., to furnish them a quantity of four foot wood, to be delivered at a certain point on said road, on or before April 1, 1852.

That in December, 1851, or January, 1852, the defendants owned a yoke of oxen, which the plaintiff wanted to purchase, and that it was then agreed between the parties, that plaintiff should have the cattle, and should pay the defendants for them by cutting, drawing and cording up, at the place where defendants were to deliver said wood to said Railroad Co., seventy-five cords of wood, the said wood to be cut on the land of defendants, at a place named ; that no time was expressly limited in which plaintiff was to deliver said wood, but was informed by the defendants of their contract with the said Railroad Co. ; that the said cattle by the terms of their contract were to remain the property of the defendants, until paid for as before stated ; and that plaintiff took possession of the said cattle immediately upon making said contract, and used them in drawing said wood in the winter of 1852, till into March, when he supposed he had drawn enough to fulfill his contract.

That the wood was surveyed by a person agreed upon, and

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there proved to be but seventy cords; the plaintiff finished getting this wood between the 10th and 15th of April, 1852, but has never got out the other five cords. That in the latter part of March, 1852, the plaintiff let the defendant, Bellows, have the said cattle to use for a time for their keeping; and that about a week before plaintiff finished getting said seventy cords of wood, he went to Bellows, and told him he wanted the cattle, that he thought they were growing poor, and he was agoing to get one Johnson, to keep them; that said Bellows refused to let plaintiff have them, as he had heard and suspected that plaintiff was intending to sell them; but told plaintiff, he might take them if he would give security that he would finish the wood, according to agreement. That plaintiff refused to do this, and insisted on having the cattle *then*, and said if he did not have them *then*, he should not take them *at all*.

That said cattle remained in defendant's possession until the 12th day of April, 1852, when they were attached on a writ against the plaintiff, which suit is still pending, and that the sheriff sold said cattle under the laws of New Hampshire.

The auditor found that the cattle were worth \$65, at the time they went back into defendant's hands; and that the chopping and drawing said wood was worth one dollar per cord, in the whole \$70, and also that said seventy cords of wood was sold to said Railroad Co. by the defendants before the commencement of this suit.

Upon these facts, if the plaintiff is entitled to recover, the auditor found due him from the defendants to balance book accounts the sum of \$71,97; but if the court decide that plaintiff is not entitled to recover then the auditor found due to the defendants from the plaintiff the sum of \$2,93.

The County Court, January Term, 1854,—COLLAMER, J., presiding,—rendered judgment on the report for the plaintiff to recover the sum found due by the auditor.

Exceptions by defendants.

A. Underwood for defendants.

It is manifest from the finding of the auditor, the *cutting and drawing, &c.* of the wood, was a *condition precedent* to plaintiff's right to *have the cattle*. Plaintiff *wanted to purchase*. It was

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agreed he should have them and pay by cutting, &c., and they were to remain defendants' *till the contract was fulfilled*.

From the finding of the auditor, plaintiff was clearly in the wrong. He had no right to demand the cattle not having performed the contract, by the *time stipulated*, and refusing to give other security, that it should be thereafter performed.

Had the defendant, given the plaintiff a bond for a deed of lands on *payment of the price*, by a time certain, as well might he *recover back the part of the consideration paid*, because defendants *refused to convey* before the whole consideration is paid.

A mortgagor may with equal propriety recover back what is paid on the mortgage debt, because the mortgagee refuses to release his mortgage before *all is paid*. *Sutton et al. v. Estate of Sutton*, 13 Vt. 71. *West v. Bolton*, 4 Vt. 558. *Bigelow v. Huntly*, 8 Vt. 154. *Batchelder v. Warren*, 19 Vt. 377. *Chandler v. Edwards*, 3 Vt. 161. *Fay v. Oliver*, 20 Vt. 118.

Again, should the court consider the *time*, for completing plaintiff's contract was not *limited* to April first, then it is insisted the contract was executory, and plaintiff's claim, if he had one, was for the recovery of *damages*, and could not be recovered on *book account*. *Smith v. Smith*, 14 Vt. 440. *Bayley v. Bayley*, 16 Vt. 656.

The contract could not be rescinded by the plaintiff alone, unless something was done by defendants tantamount to a *rescinding on their part*, which it is insisted was not done, the defendants all the while insisting plaintiff should perform, and standing ready to deliver the cattle when performed, or *before*, on receiving other security. *Allen v. Edgerton*, 3 Vt. 444. *Hammond v. Buckmaster*, 22 Vt. 375. Chitty on Cont. 578.

The parties could not by *rescinding*, be put in *statu quo*. The plaintiff had had the *use* of the cattle to *draw the wood*. Defendants were *owners* of the *wood*, and plaintiff had expended his *labor* upon it *only*.

The case of *Stone v. Pulsifer*, 16 Vt. is *different* from the present case. In that case, the defendant *reclaimed the oxen*, and appropriated them to *his own use*, by killing one, and selling the other. This was an act on the part of the defendant, which authorized plaintiff to treat the contract as rescinded. It was a *rescinding* on the part of defendant.

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R. McK. Ormsby for plaintiff.

The contract in this case was not performed. The auditor reported facts, from which the fair inference is, that the defendants refused to deliver possession of the oxen to the plaintiff before the failure of the plaintiff in respect to his part of the contract.

The plaintiff was by the bargain entitled to the possession of the oxen, until a failure on his part; and no time was expressly fixed or specified, and as, on refusing to re-deliver the oxen on request, the defendants set up other causes in excuse, and did not complain that plaintiff was in fault, as to the performance of his contract, the county court rightfully considered that the demand of security by the defendants under the circumstances was unauthorized.

If by the wrongful act of defendants, plaintiff was at liberty to put the contract to an end, he can recover for what he did. *Tyson v. Doe*, 15 Vt. 571. *Gilman v. Hall*, 11 Vt. 510.

To authorize a recovery on book account, the case of *Stone v. Pulsifer*, 16 Vt. 428, is directly in point, running with this *quatuor pedibus*. *Stearns v. Havens et al.*, 16 Vt. 87. *Austin v. Wheeler*, 16 Vt. 95.

The opinion of the court was delivered by

ISHAM, J. The case of *Stone v. Pulsifer et al.*, 16 Vt. 428, seems quite decisive of the questions which have been raised in this case. It was there held, that when property was sold conditionally, and payments had been made for it by way of services, the services might be charged on book, to await their subsequent application; and if the property sold has been received back by the vendor, the vendee, may recover for his services, in an action on book, before any application has been made.

The sale of the oxen to the plaintiff in this case was conditional; they were to remain the property of the defendants until paid for. The payment of the whole sum was a condition to be fully performed, before the vendee had any title or attachable interest in the property. *Smith v. Foster*, 18 Vt. 182. The plaintiff took, and under the contract of sale, was to have the immediate possession and use of the oxen, to enable him to deliver the wood which he was to procure in payment for them. The wood for the oxen was to be cut, corded, and delivered, by the time and in a manner

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that would enable the defendants to use it in fulfilling, and to that extent, performing their contract which they had made with the Railroad Company. As the plaintiff's contract was not performed, either as to time or quantity, by the 1st of April, 1852, the defendants were not bound to receive the wood; yet his default in this matter might be waived by the defendants, and was so, by receiving the 70 cords of wood which were surveyed about the 15th of April, 1852, and by their disposing of the same under their contract with the Railroad Company. For that wood, the defendants are accountable to the plaintiff, either by receiving it in payment towards the oxen, or by paying him its value. If the defendants have done no act disaffirming the plaintiff's right to the cattle, the plaintiff cannot recover in this action. But if they have in any way disaffirmed the contract, or refused to fulfill on their part, by re-taking the possession of the oxen, they must then account in this action, for the wood they have received.

We learn from the case, that in the latter part of March, 1852, the plaintiff permitted the defendants to take the cattle to do some work for their keeping, and while the cattle were in their possession for that purpose, and about a week before the wood was cut and corded, the plaintiff requested of the defendant, Bellows, a return of the cattle to him, which he refused, unless the plaintiff procured other security for the debt, as he had heard the plaintiff was intending to sell them. The defendants were not justified in withholding the cattle from the plaintiff from any apprehension they may have had that the plaintiff had any such object, as no such sale could be made by him, so as to defeat their title to the cattle; neither could they retain them for further security; for that would be imposing new terms and conditions to the contract of sale. The defendants' refusal to re-deliver the cattle to the plaintiff was, therefore, a denial of the plaintiff's right to them. It was a disaffirmance of the contract of sale, and of the loan under which the cattle came into their hands, and was an assertion of their right to the custody and control of them. In refusing to let the plaintiff have the cattle under those circumstances, the defendants subjected themselves to pay for the wood they had received of the plaintiff, deducting therefrom a reasonable compensation for the use of the cattle. This was the decision of the county court, and we perceive no error in it.

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The subsequent attachment and sale of the cattle by Charles Bellows, as the property of the plaintiff, can have no effect in the case. The attachment was made April 12, 1852, after a demand for the cattle had been made, and after the plaintiff's right to charge for the wood was fixed; the plaintiff, therefore, had no interest or property in the cattle that could be attached. The attachment was a violation of the right of the defendants for which they have their remedy. In such an action it has been held, that the defendants can recover the value of the property at the time of the attachment, and that the attaching creditor cannot hold the property even by tendering the amount which the vendee agreed to pay for the property. *Buckmaster v. Smith*, 22 Vt. 208. Under the decisions in this state, to which we have referred, the defendants are accountable to the plaintiff in this action for the wood which they have received, and the plaintiff is responsible for the use of the cattle in the sums as they have been respectively found by the auditor in each case; and the defendants must look to the persons who took the cattle from them, for their value.

The judgment of the County Court is affirmed.

DAN W. SHAW v. JOHN B. PECKETT & JOSHUA GERRY.

Collector. Taxes. False Imprisonment.

The assessment of taxes does not create a debt that can be enforced by suit, or a claim upon which a promise to pay interest can be implied, either before or after a demand has been made for the payment of the tax by the collector.

If a collector arrest a tax-payer, for the purpose of enforcing the payment of interest merely, the arrest will be illegal, and it makes no difference that the tax-payer neglected and refused for some years, after a demand for the payment of the tax was made, to pay the same, and that during the most of the time was out of the state, and had no known property in the state.

TRESPASS for false imprisonment. The defendants filed a special plea, justifying under a tax-bill and warrant. The plaintiff replied and set forth in his replication, that at the time he was

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arrested in August, 1851, he handed to the defendant, Gerry, the sum of \$13,25, which was the amount of the tax and costs charged by said defendant, and asked to be discharged; but, that said defendant refused to discharge the plaintiff from arrest, and for a long time kept the plaintiff under arrest and imprisoned; the said defendant refusing to set the plaintiff at liberty until he paid the sum of \$3,44, claimed by said defendant to be due as interest on the said taxes. The defendants rejoined and set forth, in substance, that the defendant, Gerry, having the tax-bills and warrants, on the first day of June, 1846, demanded the said several sums in said tax-bills due against said Shaw, of him, the said Shaw; that he refused, and ever since has refused and neglected to pay, until the 7th day of August, 1851, when said Shaw having come within the state of Vermont, and having no goods or chattels whereon to make distress, he took the body of the said Shaw, calling to his aid the said Peckett, and held said Shaw about ten hours, until he paid said taxes, costs, and said sum of \$3,44, interest, accruing from the time of said demand to the time of said payment, all of which was lawful, &c.

To the rejoinder of the defendants, the plaintiff demurred.

The County Court, January Term, 1854,—COLLAMER, J., presiding—rendered judgment that the rejoinder is sufficient, and that defendants recover their costs.

Exceptions by plaintiff.

R. McK. Ormsby for plaintiff.

The plaintiff's replication alleges, an imprisonment for interest, after paying the tax and costs.

If interest be not chargeable on taxes, then this arrest was a trespass, rendering the arrest a trespass *ab initio*. *Six Carpenter's Case*.

The defendants' rejoinder alleges a demand in 1846, which is in conflict with the allegation in the defendants' pleas, that plaintiff was out of the state; the rejoinder does not confess the allegation of plaintiff in his replication, that plaintiff paid the tax and cost, and was imprisoned on the interest; nor does it traverse that allegation.

The rejoinder is inconsistent with, and supersedes the plea of the defendants.

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J. W. D. Parker for defendants.

I. By law the state tax is payable into the treasury, on the first day of June, in each year ; so is the command in the warrant to the collector. The town tax was also payable on the first day of June, into the town treasury, and so is the warrant. It is the custom, uniformly, and has been practised so long in this state, that the court will recognize the practice, as common law, that if the money is not paid by the time limited, interest is to be charged against the collector by the treasurer. We believe this custom is as old as the government, and should be recognised and sanctioned by the court.

II. In the 3 Blackstone's Com. 158, it is said, " Every person "is bound and hath virtually agreed to pay such particular sums "of money as are chargeable on him by the sentence, or assessed "by the interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake of the benefit of society, to submit, in all points, to the municipal constitution and local ordinances of that state of which each individual "is a member. Whatever, therefore, the law orders any one to "to pay, that becomes instantly a debt which he beforehand contracted to discharge."

If any man undertakes, and is bound to pay the principal, equally so is he bound to pay the interest, on default after notice and demand. The government and tax-payer may well be considered as the principals in the transaction, and the collector as the agent of both ; of the tax-payer to give him notice that he is taxed ; of the state, to demand it, and in case of default in the payment, on notice, to collect and pay over the debt, both principal and interest.

III. The collector was compelled to pay over the taxes to the several treasurers, on the first day of June, 1846. The law presumes a public officer has done his duty. Then on principle, money advanced by one man for another's benefit, draws interest from the time of payment, or at all events, from the demand for repayment.

Interest is allowed on two grounds.

1. Because it is promised. 2. Because the creditor is kept out of his money after it is due. The taxes were payable on a day certain ; a note payable on a day certain always draws interest

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after the day has passed—Where is the difference? 2 Davis' Abridg. 212 § 2, 8. 1 Amer. Lead. Cases 525, note 4. *Walker v. Bradley*, 3 Pick. 291. *Dodge v. Perkins*, 9 Pick. 868. *Bernard v. Bartholomew*, 22 Pick. 291.

IV. As to the demurrer—The rejoinder must conform to the replication. This is so here, and this is enough. The rejoinder is an answer to the replication; if that is bad, the rejoinder is sufficient for a bad replication, and if they are both bad, the plea is sufficient. *Scott v. Dixon*, 2 Wilson 8.

The plaintiff should have new assigned. *Oakley v. Davis*, 16 East. 82.

The opinion of the court was delivered by

ISHAM, J. The judgment of the county court in this case must be reversed. The arrest of which the plaintiff complains, is admitted by defendant, Gerry, in this plea, but he justifies the same as collector of taxes. From the facts, which are admitted by the demurrer, it appears that the plaintiff was assessed, in the sum of \$11,96, as specified in two several rate-bills and warrants, which were issued and placed in the defendant's hands, as collector; and that for the non-payment of these two taxes the arrest was made.

The legality of the assessments, rate-bills, and warrants, are not disputed, but it is insisted that the arrest was illegal, as the plaintiff handed to defendant, Gerry, the sum of \$13,25, being the amount of the taxes and costs, and requested to be discharged, which said defendant refused to do, until the further sum of \$3,44 was paid as interest on the taxes. The defendant states as a ground for the recovery of the interest, that he made a demand for the payment of the taxes, on the first day of June, 1846, and that the plaintiff neglected and refused to pay them, until the time of the arrest in August, 1851. The demurrer admits that the arrest was made for the purpose of enforcing the payment of interest merely. The question arises, whether for that purpose, the arrest and commitment was legal.

We are satisfied that the collector had no right to demand and enforce the payment of that interest. The taxes were assessed in 1846, and have remained in the hands of the collector until their payment in 1851. The plaintiff was absent from the state during all the period from the time of the assessment, to the time

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of the arrest, and had no property in this state, known to the collector, which could be distrained. There is no provision of the statute authorizing him to collect interest on taxes, of the persons against whom they are assessed, and we perceive no provision which subjects the collector to the payment of interest under such circumstances. The assessment of taxes does not create a debt that can be enforced by suit, or upon which a promise to pay interest can be implied. It is a proceeding purely *in invitum*. The existence of a contract either express or implied, is the ground on which interest is generally allowed. Until the statute for that purpose was passed, an officer having an execution in his hands for collection, could not levy the same on the person or property of the debtor, to enforce the payment of interest on the judgment. There is obviously more propriety in allowing interest to be collected in such cases, by the officer, where the debt arises from the contract of the parties, than in cases of this character.

The justification is deemed insufficient, and the judgment of the County Court must be reversed and the case remanded.

ISAAC H. MORRISON v. BENJAMIN CUMMINGS.*Contract. Damages. Quantum Meruit.*

M. under a special contract, undertook to construct a certain number of charcoal kilns for C., but did not construct the same strictly according to the terms of the contract, though his labor was of some benefit to C.; under these facts, M. may recover on *quantum meruit*, as much as his labor is worth to C., unless C. does something, amounting to an acceptance of the work, or to a waiver of his claim for a deduction.

A mere use of the kilns without objection, where the defect is not apparent, but one that could only be discovered by use, will not amount to such acceptance of the work, or waiver of his claim for a deduction.

So also, a part payment, for the labor of M., can only be regarded as an acquiescence, to that extent.

BOOK ACCOUNT. Judgment to account was rendered in the

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county court, and an auditor was appointed, who reported substantially the following facts :

That plaintiff presented his account of which the following is a copy :

“ 1849, Nov. 1, To building four charcoal kilns, in Orford, N. H. as per agreement, \$288,70 ”

The defendant also presented an account against the plaintiff, amounting to the sum of \$180,41, which was found correct, and allowed as charged.

As to the plaintiff's account the auditor found, that said kilns were built in pursuance of a written agreement.

That in consequence of bad masonry, two of said kilns leaked badly, and neither of them were air tight as specified in said agreement ; that the damage to the defendant resulting from the defects and insufficiency of said kilns is equal to the amount now claimed by the plaintiff to be due from the defendant on said contract.

And the auditor found, that there was nothing due from either party to balance accounts between them.

The auditor also further found and reported, that plaintiff commenced building said kilns, October first, 1849, and finished them October 30th, the same year.

That the plaintiff, the day he finished said kilns, commenced a suit against the defendant on his contract, returnable to the Spring Term, of Grafton county court, in N. H. ; that in April, 1850, the plaintiff saw the defendant and told him, that had he known his circumstances, he should not have commenced said suit, and that he had withdrawn the same, free from expense to the defendant, and at the same time requested the defendant to pay the laborers employed in building said kilns, as fast as he was able ; that the defendant agreed so to do, and has paid some of the laborers since that time.

That no conversation was ever had between said parties, as to whether said kilns were built according to the contract or not, they having never seen each other since the kilns were completed, except as before stated in April, 1850. That the parties resided about fifteen miles from each other, till late in the fall of 1850, when the plaintiff left the state, and has not since returned.

That the defendant soon after said kilns were built, tested them

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by burning wood in them, and though they were not according to the contract, defendant has continued to use them ever since.

The auditor submitted to the court, whether from the facts found there was such an acceptance by the defendant of said kilns, as would preclude him from claiming a deduction from the price specified in said contract for building the same; and if the court should be of the opinion that there had been such an acceptance, then the auditor found for plaintiff to recover \$ — &c.

The County Court, June Term, 1853,—COLLAMER, J., presiding,—accepted the report of the auditor, and rendered judgment thereon for the defendant to recover his costs.

Exceptions by plaintiff.

Lund & Morris and R. McK. Ormsby for plaintiff.

The report finds, that the work was done for the defendant under a written contract.

That as to the time and extent of the performance of the work, it had been done in accordance with the contract; and that the insufficiency was occasioned by the manner in which the work was done. That defendant soon after the kilns were built tested them, and has ever since used them without objecting to their insufficiency; and that in April, 1850, the defendant saw plaintiff, and agreed as fast as he was able, to pay plaintiff's laborers, towards the price of said work, and in pursuance thereof, has from time to time made payments, &c.

The law in such cases is, that after an acceptance of the thing, and long acquiescence, until a controversy arises about the pay, the parties cannot then be thrown back to test the thing *de novo*; but will be held to their own construction of their contracts, as evidenced by their acts at the time of performance. *Austin v. Wheeler*, 16 Vt. 95. *Wilkins v. Stevens*, 8 Vt. 214.

In this case, there was no part of the work left unperformed.

And where work to be done in a particular manner is accepted and reduced to use by the party for whom it is done, though not executed in the manner stipulated, he cannot insist upon the deficiency as a non-performance of a conditional precedent in an action against him for the price; all that he can claim is a reduction for the part left unperformed. The party in such case is deemed to have waived the condition. *Vanderbilt v. Eagle Iron Works*, 25

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Wend. 665. It was the duty of the defendant as soon as he had tested the kilns, to have made known their imperfections to the plaintiff, that he could remedy them; and his silence and acquiescence, until the very last moment in the trial of this suit, should preclude him from claiming a reduction as damages.

The auditor finds, and the county court has allowed the defendant *damages* in offset to plaintiff's claim; he should have found what plaintiff's services were reasonably worth, taking into consideration the failure to perform the contract according to its terms. A trifling sum might have cured the defect in the kilns, and yet, by imprudent use of them, defendant may have been put to damages more than their original cost. The report finds, that the kilns were built at a stipulated price and accepted; and has not found that the labor of the plaintiff was worth less to defendant, laying all contract aside, than the sum agreed upon.

S. Austin for defendant.

The plaintiff charges the defendant with the building of four charcoal kilns. The work was to be done in pursuance of a special contract signed by the parties.

The auditor finds, that the work was not done according to the stipulations of the contract in point of quality; and that the failure of the plaintiff to perform the contract was as much damage to the defendant as there might have been due the plaintiff, by the terms of the contract, had the work been done according to the stipulations thereof.

This we think correct, and as was decided in *Dyer v. Jones*, 8 Vt. 205. The case stands precisely, in our view, as it would if nothing had been paid by the defendant. In that case the plaintiff would recover what he deserved for his labor, deducting the damage to the defendant, for the non-fulfillment of the plaintiff's contract.

This was done in effect and principle by the auditor. 11 Vt. 510. *Booth v. Tyson*, 15 Vt. 515.

The case of *Austin v. Wheeler*, 16 Vt. 95, is not like this case; there is no analogy between them. 1. Because the work was to be done and the kilns to be built in such a manner as that they could be tested by use, as found by the auditor. 2. The defendant was placed in such circumstances, that he was obliged to use them, in

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order to find the fact whether the kilns were built according to the plaintiff's contract.

If any objection is made to the time of the use being construed into acquiescence, we answer ; the plaintiff left the country soon after the conversation in April 1850, and that of course is a sufficient excuse for the defendant to remain silent till the plaintiff undertakes to assert a farther claim under the contract.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. The deduction which the auditor and county court made in the allowance for the plaintiff's work seems to us well justified, by the decided cases. That the plaintiff if he had not fully performed the contract, on his part, could at most recover, what the service was worth to the defendant, is well settled by the case of *Dyer v. Jones*, 8 Vt. 205, and the subsequent cases, which have followed the principles of that case. The deduction made, was then properly made, unless the defendant did something amounting to a waiver of claim, for this deduction, or an acceptance of the work.

II. We think nothing appears in the case to show that, fully. The mere use of the kilns, without objection could not amount to this, inasmuch, as this was not an apparent defect, but only one to be discovered, by use, or by tests. After that, the parties did not meet, until the plaintiff had brought a suit, in New Hampshire for the work, for which he acknowledged regret, and a willingness to make amends, by withdrawing it. Nothing passed then which ought fairly to be construed as a waiver of all claims, for damages, for the non-performance of the work. And after that, the parties did not meet before the account fell into the hands of an attorney for collection. The payment made to the attorney could, at most, be regarded as an acquiescence, to that extent. He had a right then to be silent.

We do not understand, by the auditor's report, that he has allowed damages, by way of deduction, from the amount of the charge, beyond the amount of its original deficiency. We understand it to be a form of expression to show, that the work was as much less valuable at the time it was done by plaintiff, than it would have been, if done according to the contract, as all that is now apparently due.

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And the fact that these kilns were upon the defendant's land, where he must of necessity keep them, and at least, pay their value, makes the use of them, less a constructive acceptance of them, than if they could have been altogether repudiated.

Judgment affirmed.

EPHRAIM THAYER v. JOHN MONTGOMERY.

Justice of the Peace. Jurisdiction.

A justice of the peace has no jurisdiction in an action of account, between tenants in common of land; as the defendant may plead in bar, that he was never bailiff and receiver of the plaintiff, and thus put the plaintiff upon the proof of his whole declaration, which would bring in question the title to the land.

Where the title of land is concerned in the action, and the justice has no jurisdiction, the defect may be taken advantage of at any time, during the pendency of the action.

THIS was an action of account, in which the plaintiff declared against the defendant, as "tenant in common of Lot No. 8, in the first division in Braintree, or a part thereof, with the plaintiff from, &c., and during this time received more than his share of the wood, timber, rents and profits of the same," &c.

The action was originally commenced before a justice of the peace, and the defendant moved to dismiss for want of jurisdiction, which motion was overruled; and the case appealed to the county court.

The defendant, in the county court renewed his motion to dismiss, on the ground that the title of land was concerned. The County Court, January Term, 1854,—COLLAMER, J., presiding,—sustained the motion of the defendant, and dismissed the action.

Exceptions by plaintiff.

J. P. Kidder for plaintiff.

I. This action *may* involve the title of land; but it does not necessarily involve that question, for the reason, that there is no *general issue* in the suit. 1 Chit. Pl. 524.

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If no special plea is filed, the defendant's liability to account is conceded; then the only question remaining for litigation is as to the amount in arrear, which would in no sense involve the question of title.

There is a large class of cases, where the title is necessarily involved, for the reason, that, upon the plea of the *general issue*, which is always supposed to be pleaded in the absence of any other, the plaintiff's first step must be to prove his title.

The cases, *Whitney v. Brown*, 11 Vt. 250, *Haven v. Needham*, 20 Vt. 183, and *Shaw v. Gilfillan*, 22 Vt. 565, relied upon by the defendant, are all actions on the case, wherein, under the general issue, title to land was, not only *directly*, but necessarily concerned.

2. In the action of account, there being no general issue, if no plea is specially filed, judgment to account is rendered which precludes raising the question of title. The question of title, then, is not necessarily involved, and unless raised by the pleadings, is not concerned. *Whitman v. Pownal*, 19 Vt. 223.

In the case last cited the Judge, who delivered the opinion of the court, said, "It is left, then, to be determined by the pleading subsequent to the declaration, whether it comes within the statute."

The tenancy in common, in the case at bar, is not traversed, how then, can the court see, that the "*title of land is concerned*?"

The motion before the justice was merely to dismiss, without any allegation that the tenancy in common is denied, which he overruled, and proceeded to adjudicate the accounts. This being the case, I am inclined to the opinion, that the appellate jurisdiction of the county court cannot in any mode be affected.

3. In an action of assumpsit for rent, wherein the plaintiff would have to show the relation of landlord and tenant to exist, that a justice has jurisdiction cannot be denied; and in other actions where the title of land is concerned. *Vide Whitney v. Pownal, Haven v. Needham.*

4. A justice has jurisdiction of the action. *Chadwick et al., v. Divol*, 12 Vt. 499.

P. Perrin and J. B. Hutchinson for defendant.

1. Where the title of land is concerned, a justice of the peace has no jurisdiction. Comp. Stat. 283 § 20. *Whitney v. Bowen,*

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11 Vt. 250. *Haven v. Needham*, 20 Vt. 183. *Shaw v. Gilfillan*, 22 Vt. 565. *Prindle v. Cogswell*, 9 Vt. 183.

The jurisdiction of a justice is expressly given by statute, and is not a common law jurisdiction, and cannot be implied or extended. *Paine v. Ely*, 1 D. Chip. 37.

The plaintiff's writ and his testimony must both show a case within the jurisdiction of a justice. *Bates v. Downer*, 4 Vt. 178.

2. It was not necessary to plead any special plea in this action. The motion to dismiss was in order at any time. The title of land was the first thing in issue, and the justice then should have immediately dismissed the case without any motion. Where the court have not jurisdiction of a suit, no neglect of defendant to plead such want of jurisdiction, or agreement even, of the parties, will avail to give the court jurisdiction. *Glidden v. Elkins*, 2 Tyler's R. 218.

The opinion of the court was delivered by

REDFIELD Ch. J. This is an action of account between tenants in common of land, commenced before a justice of the peace, and brought into the county court by appeal, and then dismissed, for want of jurisdiction in the justice. The only question made is, whether the title of land is concerned in the action. It is true, that in form there is no general issue in this action. But the defendant may plead in bar, that he was never bailiff and receiver of the plaintiff, in the manner alleged in his declaration, and this puts the plaintiff upon the proof of his whole declaration. In that case the very first step in the proof is, to show the title out of which the relation grows, and from which results the obligation to account. Under our statute it is not necessary to allege, or prove, any contract between the parties. The action goes mainly, and merely, upon the title. And this denial of being bailiff and receiver, is the most common form of pleading, if the obligation to account is contested. And if the action is contested the title must be shown, if it is denied. The title is then as necessarily, and as directly concerned, in this action, as in an action of covenant, on the covenants in a deed of lands. There is in that action no general issue, as applicable to the covenants, the general issue being *non est factum*, and this only putting the party, upon proof of his deed, which does not involve any inquiry, into the title

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of land. But inasmuch, as the title of land is involved, in the trial of the action, on its general merits, it has been held, that a justice, has no jurisdiction of the action. *Hastings v. Webber*, 2 Vt. 407. We can entertain no doubt the title of land was concerned in this action, and that the justice consequently had no jurisdiction. This objection need not necessarily be moved at the first term. It is a defect which may be taken at any time, during the pendency of the action, and would probably render any judgment, which should have been rendered in favor of the action, void, if the defect appeared, as it must, upon the face of the proceedings.

Judgment affirmed.

JACOB P. EASTMAN & AMOS PAIGE v. WILLIAM WATERMAN.

Where property of a defendant residing out of the state is attached, and notice has not been given to the defendant, and judgment is rendered by default, before execution can issue, a recognizance for review must be entered, or the execution will be set aside on *audita querela*.

The record of the justice is conclusive on the question of notice, to the defendant.

Parol testimony is inadmissible for the purpose of contradicting the facts certified and stated by a justice in his record, whether the matter arises collaterally, or upon the writ of *audita querela*, brought to set aside that judgment.

When notice of the suit upon the defendant, is found and certified by the justice, he has no right to require or take a recognizance of the plaintiff for review.

The entry of a continuance being in the hand writing of the plaintiff's attorney, furnishes no ground of objection, if the justice granted the continuance, and adopted and assented to the entry, by placing his official signature to the same.

AUDITA QUERELA, to vacate the judgment of a justice of the peace.

It appeared on the trial, that on the 26th day of April, A. D.

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1851, the defendant sued out a writ, before George W. Prichard Esq., a justice of the peace, for the county of Orange, returnable on the 10th day of May, 1851; that said writ bore date, as appears by the writ, April 28th; but was served, as appears by the officer's return, April 26, 1851.

That said Eastman & Paige were residents of Massachusetts, and that some five years ago they had a job upon the Passumpsic Railroad, and had been absent some two years when the said writ was served.

It appeared, that said writ was served by attaching old iron and other articles, along the line of their work, and a copy left where the property was found. On the 10th day of May, 1851, an affidavit was made showing notice on Eastman, one of the partners of the firm of Eastman & Paige, but the justice, not considering it sufficient notice, continued the cause to the 27th day of May, 1851, as appears by the record and the testimony of the justice; on the 27th day, no further notice having been given, the said justice again continued the cause to the 24th day of June then next. On the said 24th day of June, the said justice being absent from the state, the said cause was again continued to the 24th day of July, then next, by another justice. On the said 24th day of July, the justice adjudged that the defendants had had notice proved upon them.

The justice, however, in his statement, which was put into the case, says, "I find the fact to be, that no further notice than the original or first named notice in the affidavit, had been given or made; but being informed by the plaintiff's attorney, that in the county court, in the case *E. A. Cilley v. Eastman & Paige* commenced at the same time of Waterman's, a notice the same as proved in this case, had been adjudged sufficient," the said justice so decided, and adjudged that the defendants had been notified and defaulted the defendants.

The fact that the county court had so decided, in the case of *Cilley*, was conceded.

That early in July, 1851, Mr. Eastman came to Bradford, and procured the property attached in this and other suits, to be receipted; but that it was afterwards sold on execution and was not taken away on the receipt. It also appeared that the plaintiffs, in October, sent one Henry Fox to look after their effects in Bradford; that he

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inquired of Judge Parker, who had been formerly counsel for the plaintiffs, Eastman & Paige, in other causes; and that Parker in company with Fox, went to the office of R. McK. Ormsby, and found the writ in the case of *Waterman v. Eastman & Paige*, with the judgment thereon rendered. That the property sold on execution was worth more than was realized for it on the officer's sale; and the officer sold the iron in heaps or lots, by the pound; that there was much more than was expected on weighing it out, leaving a surplus in the hands of the officer, which surplus, after paying the amount in the execution, was received by the plaintiffs, of the officer early in 1852.

The defendant claimed, that the justice having on the 24th day of July, adjudged the defendants notified, it was not an act to be revised in this action; that notice to one partner was in law notice to both, and offered an affidavit of facts expected to be proved by one Sawyer, in relation to notice to said Eastman, which was admitted.

It also appeared, that the continuances in the case were entered in the hand writing of Waterman's attorney, and that the justice had no action in these entries, except to sign his name as justice to the same.

The court,—COLLAMER J., presiding,—found that the judgment of the justice against Eastman & Paige was rendered without any notice to said Paige, who resided in Massachusetts; that the execution issued without any bond being given, and that the property sold on execution exceeded in value besides the amount of money returned to the plaintiffs more than \$——, and thereupon rendered judgment for the plaintiffs, setting aside said judgment and execution and giving damages, \$——

Exceptions by defendant.

R. McK. Ormsby for defendant.

The case shows Eastman & Paige were general partners, and that the writ was served by attaching partnership property; continued from May 10th to May 27th; then to June 24th for notice; then by another justice to July 24th, and on the last named day, the justice decided "defendants notified," and judgment.

Were this but a statute or judgment *in rem*, i. e., entered up without notice, it would be good. *Marvin v. Wilkins*, 1 Aik. 107, was not like this—there, there had been no continuance; see

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Comp. Stat. Chap. 29 § 57, 58. Where property is attached and the statute pursued, a judgment *without notice* is regular. It may be irregular to issue execution on such judgment without bond. Comp. Stat. Chap. 29 § 59. But the defendant's right of *review* does not depend on the bond. See Comp. Stat. Chap. 29 § 60, 61, 62, 63, 64. The bond indemnifies against the execution, but is *not a condition subsequent with power to effect the judgment*. If execution issue prematurely, it may be arrested by *audita querela*. *Johnson v. Harvey*, 4 Mass. 483.

On the 24th day of July the justice adjudged notice on the defendants proved. No imposition on the justice is pretended. It was strictly a judicial act. The justice may have erred in judgment; but *audita querela* does not lie to correct error or mistake of court. To sustain this action some improper conduct of the other party must be shown.

The decision of the justice upon interlocutory questions is not open to examination in this action. *Sutton v. Tyrrell*, 10 Vt. 87. *Griswold v. Rutland*, 23 Vt. 325. *Olcutt v. Peckett*, 4 Vt. 17.

The case in 22 Vt. 634, is not decisive of this cause, for many reasons, viz: In *Whitney & Titus v. Silver*, 22 Vt. 634, the judgment against Titus was void *as to him*, for want of jurisdiction; neither his individual property, nor the property in which he had a partnership, or any kind of interest was attached. He had no notice of the action, and his business relationship with Whitney would not justify the idea of his being bound by Whitney's acts, without, as the court expressed it, opening a door to frauds. In that case there was no interlocutory decision of the justice as to notice to Titus, nor did the record show that his associate defendant assumed to appear for him.

In this case, the property of the plaintiffs gave the justice jurisdiction. Every step was regularly taken. The judgment is in every respect strictly in compliance with the statute in such cases. Was there any necessity for a bond before issue of the execution? Not if notice was proved.

That notice to one partner is notice to all, see Colyer on Part. 238. In an action against partners notice to one of taking depositions, is sufficient. *Gilly v. Singleton*, 3 Littell 250. One partner may appear for the rest. Colyer on Part. 238. *Scott v. Larkin*, 18 Vt. 112. This may not strictly be a judgment, *in persona*.

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The court had jurisdiction of the cause, but it may be said that it *had none of the defendants below*. The notice directed by our statute is not in the nature of a process to compel appearance, and submission to the jurisdiction of a court; but for the purpose of enabling the non resident defendant to protect his property from a proceeding *in rem*. If notified to the satisfaction of the court, execution may issue. If not notified, a bond shall be filed to indemnify against the execution. Where partnership property is attached on partnership debt, in equity, notice on one partner should be sufficient to render indemnity unnecessary. *Bissell v. Briggs*, 9 Mass. 462.

But the decision of the court cannot be examined into in this action, nor can any matter, proper for the court to pass upon, be questioned. If the sheriff return a writ served on the defendant, an *audita querela* will not lie on the ground of a *false return*. If the record shows that there was an appearance for the defendant, this action will not lie for any wrong of the party. *Dodge v. Haskell*, 1 Vt. 491. *Stone v. Seaver*, 5 Vt. 549. *Tidmore v. Wainright*, 16 Vt. 178. *Spaulding v. Swift*, 18 Vt. 214.

J. W. D. Parker for plaintiff.

The statute, Comp. Stat. 244 § 17, it seems to us settles this question in all respects. But the repeated decisions of this court, at all events, set it at rest. *Marvin v. Wilkins*, 1 Aik. 107, establishes the doctrine that the copy must be left with the defendant actually, at his last abode, if absent, with a person of sufficient discretion; if out of the state, then where the property was found when attached, or it will not be evidence of legal service; and not even *prima facie* evidence of notice; so that an actual appearance or independent proof of actual notice is necessary to cure the defect.

In the case at bar, the plaintiffs, then defendants, were both out of the state, and were partners—so a copy should have been left for each of them, which it is not pretended was done; no notice to Paige in any way was ever had or shown; nor copy left for him. Eastman is shown to have had notice of some sort, on the 8th day of May, in Boston, to appear at Bradford, May 10th. If this was notice, then the judgment should have been rendered on the 10th of May; a continuance after and from that day was a discontinuance of the suit as to him. *Smith v. Runnels et al.*, 1 Vt. 148.

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No recognizance was given, as required, when the judgment was finally entered, and execution issued, and the case finds all these doings were the acts of Waterman's attorney.

Statutes, (Comp.) 236 § 57, 58, 59. There was not any notice or pretence of any notice to Paige. *Spaulding et al. v. Swift*, 18 Vt. 214. *Alexander v. Abbott*, 21 Vt. 476. *Paddleford v. Bancroft et al.*, 22 Vt. 529. *Whitney v. Silver*, 22 Vt. 634.

The opinion of the court was delivered by

ISHAM, J. The writ on which the judgment was rendered in favor of Waterman against Eastman & Paige, was served by the attachment of property, and a copy left at the place where the property was attached, as the defendants were residents of Massachusetts, and had no known agent or attorney residing in this state. The Comp. Stat. 236 § 57, 58, renders it the duty of the justice, under such circumstances, to continue the case for a term not exceeding one month, for the purpose of notifying the defendants of the commencement and pendency of the suit; and in his discretion to grant further continuances, unless he is satisfied that such notice has been given. If notice *has not been given*, the justice, after the first continuance, may render judgment for the plaintiff by default. In such case, however, before execution can issue, a recognizance for review must be entered, otherwise the execution will be set aside on *audita querela*. *Whitney v. Silver*, 22 Vt. 634. But if notice *has been given* no such recognizance is required; the judgment is final and conclusive, and the plaintiff is entitled to his execution on the judgment.

In the case now under consideration, the plaintiffs complain that a judgment in that suit was rendered against them, and that an execution was issued, without notice having been given to all the defendants of the commencement of the suit, and that no recognizance was given to refund whatever sum might be recovered by a writ of review. It is admitted that Eastman had notice of the suit, but the fact is found, by the introduction of parol testimony to that effect; that no such notice was given to Mr. Paige, and for that reason the judgment and execution were vacated, and damages awarded. From the record of the justice it appears, that the suit before him was returnable on the 10th day of May, 1851, and was continued in order to notify the defendants of the pendency of the suit, and

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by regular proceedings was further continued, for the same purpose, to July 24, 1851, when the justice adjudged, that notice of the pendency of the suit was given to both of the defendants, and the fact so adjudicated, appears on the face of his record in that suit. The question arises whether that record is conclusive in this action, on the question of such notice; or whether that record may be contradicted and impeached by parol evidence, showing that no such notice was given.

The case of *Pike v. Hill*, 15 Vt. 183, establishes a principle quite decisive upon that question. In that case it appeared from the record of the justice, that the suit before him was continued to the 22d of August, for the purpose of giving notice to the defendant of the pendency of the suit; and that on that day no notice was taken of the case, nor until the day following, when at the request of the plaintiff a further continuance was entered upon the record to the 12th of September—at which time judgment was rendered for the plaintiff by default. On the trial of the writ of *audita querela*, brought to set aside that judgment as having been rendered after a discontinuance of the suit by the neglect of the parties to appear on the 22d of August—it was held, that parol evidence was inadmissible, when offered by the plaintiff to show that he was present and appeared at that time, as its tendency was to contradict the fact certified and stated in the record of the justice. In delivering the opinion of the court in that case, the case of *Barnard v. Flanders*, 12 Vt. 657, was referred to, and approved, in which the record of the discontinuance of an action was held conclusive, in a suit against the justice; though he was directly interested to make, as was alleged he did, a false record. The principle decided in the cases of *Pike v. Hill*, and *Barnard v. Flanders*, renders parol testimony inadmissible, when offered for the purpose of contradicting the facts certified and stated by a justice in his record, whether the matter arises collaterally, or upon the writ of *audita querela* brought to set aside that judgment. In either case the principle applies, which has been frequently recognized in this state, that the records of a justice of the peace are conclusive evidence of the facts there stated, and judicially found, and can no more be impeached or contradicted by testimony *aliunde*, than can the records of any other court when

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acting within the sphere of its jurisdiction. *Stone v. Proctor*, 2 D. Chip. 109. *Martin v. Blodgett*, 1 Aik. 379.

In the case of *Stone v. Proctor*, it was observed, "that justice's courts were courts of record. If a justice of the peace should refuse to record, or to certify his record of any cause by him tried, of which he has jurisdiction, this court have power to compel him, but when once the record is produced, it has the same conclusiveness between the parties, as the record of any other court." In this case, if the justice had neglected to record his proceedings, or to certify a full record of them, the performance of his duty in that respect, might have been enforced by direct proceedings against the justice. But if, instead of resorting to those proceedings to obtain a correct and full record, the party sees fit to meet the record as made by the justice, he must be bound by the facts there stated and certified. In such case, the record must be regarded as the only proper evidence in actions of this character, or whenever the facts there stated arise collaterally between them, unless some provision by statute is otherwise made. That is the principle of the cases in this state, and it is the doctrine of the common law. *Brittain v. Kinard*, 1 Brad. & Bing. 432. *Mather v. Hood*, 8 Johns. 46. In all these cases, the testimony of the magistrate is as inadmissible as that of any other person, for the objection, is to the degree and competency of the testimony, and not to its credibility. It was so ruled in the case of *Nye v. Killam*, 18 Vt. 594, in which the court observed, "that parol evidence of the magistrate should not have been received for the purpose of *proving or supplying any part of the record*, or files in the case." If the justice had stated in his record, the facts disclosed in his affidavit, the case would be different from that which now arises. But so long as the record of the justice remains as now certified, we must regard it as affording conclusive proof that notice of the pendency of the suit was given to both of the defendants in that action, and consequently that no recognizance for review was necessary in the case.

The fact being found by the justice, and stated in his record, that notice of the commencement of the suit was given to both of the defendants, the plaintiff was entitled to his judgment and execution, as a matter of legal right. The justice had no right to require or take a recognizance for review, after that record was

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made; for that can be required only after the first continuance of the case, and where there is no record evidence that he was satisfied that notice had been given. If a recognizance had been taken it would have had no legal effect; the act of taking it by the justice would have been without judicial authority, as it was not required or authorized by any provision of the statute. A writ of review could not be sustained, so long as that record remained, and if brought, the difficulty arising from that statement in the record could not have been avoided by the testimony of the justice, or of any other person, showing that the record was incorrect, and that notice was not given. If the testimony would not be admissible in such a case, it ought not be received in this case; for it would be exceedingly inconsistent to vacate that judgment and execution under this writ, for the want of such recognizance, when the recognizance, if it had been given, would have been of no avail, and would have had no legal effect.

If the justice had not jurisdiction of the subject matter of the suit before him, or if the proceedings had been such that the suit was thereby discontinued, a judgment rendered under such circumstances would be vacated by this writ. *Crawford v. Cheney*, 12 Vt. 567. So too, if by the fraud of the party the defendant has been deprived of his day in court, this remedy may be had; for this writ is a remedial and equitable process, and relief is granted, not as acting upon the judgment of the court, but upon the wrongful and fraudulent acts of the party. *Little v. Cook*, 1 Aik. 363. When a judgment or a record of a justice has been obtained by fraud of the party, the judgment and the proceedings will be inquired into, under this writ. It was upon the application of these principles that the case of *Paddleford v. Bancroft*, 22 Vt. 535, was decided, to which we have been referred. This case, however, does not fall within those principles. The justice had jurisdiction of this case; the suit had not been discontinued by any informality in the proceedings before the magistrate; and from the facts stated in the record, the party was entitled to his execution on the judgment; neither has the defendant been deprived of his day in court by the fraud of the party. No such fact is found or stated in the case. Under such circumstances, there is no ground upon which to sustain this writ. The remedy of the party is to be found in another mode. Either by causing the facts

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which he claims to exist to appear on the record of the justice, and then seek his relief in this form ; or by a petition under the act granting relief where a judgment was obtained by fraud, accident or mistake ; a remedy which was sought and obtained under circumstances precisely like the present in the case of *Mosseaux v. Brigham*, 19 Vt. 458.

If notice of the pendency of that suit had been given in fact to both of the defendants, it is not pretended that a recognizance was necessary, or that there would be any ground of complaint. So long, therefore, as a judicial record of that fact exists, made by a court having jurisdiction of the case, we are not permitted, in this manner, to go behind that record, and on the testimony of the magistrate, or any other person, to re-adjudge the matters then judicially before him, and vacate the execution and judgment of that court.

There is no objection to the entry of the continuance being in the hand writing of the plaintiff's attorney, if they were granted by the court, and the entries adopted and assented to by the justice in placing his official signature to them. That the continuances were so granted, and the entries assented to, is distinctly stated in the case. Neither is this affected by the fact that but one copy was left in the service of the original writ. Those are matters that cannot be reached by the writ of *audita querela*.

The judgment of the County Court must be reversed, and judgment rendered for the defendant.

TAPPAN STEVENS v. ARAD S. KENT.*School Districts. Officers. Taxes.*

It is not necessary that the moderator chosen at the annual school district meeting should preside at all subsequent meetings of the district during the year; the proceedings will be valid if the district should at a subsequent meeting elect a moderator to preside over that meeting.

The prudential committee of a school district refusing to do a particular act, in

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his official duty, in good faith, not believing it to be a duty, will not create a vacancy in the office; but if a new district should be erected, and the prudential committee of the old district is included within the limits of such new district, it will create a vacancy in the office.

The fact that a school district mistook their rights, and the location of their school house proved to be illegal, and upon indictment was adjudged a nuisance, will not effect the validity of the tax raised to build the school house.

A public officer is entitled to reasonable intendments in his favor, the same as are applied to the proceedings of courts.

REPLEVIN for a wagon. Plea, the general issue, and trial by the court.

On the trial, the taking of the wagon by the defendant was conceded. It was also proved, that there had been a school district, in Newbury, supporting schools, holding school meetings regularly and doing business generally done by school districts, for the last forty years, called district No. 8.

It further appeared, that at a regular meeting of said district, duly warned, and held on the 30th day of September, A. D. 1850, (being the annual meeting,) the warning of which contained among other articles the following: "1st. To choose a moderator. 2. To choose a Clerk, Prudential Committee, and Collector for the year ensuing. And 5. To see if the district will agree to build a new school house."

It appeared, that Charles Story was chosen moderator; Tappan Stevens, (the plaintiff,) Prudential Committee; Arad S. Kent, (the defendant,) Collector. And the following votes were passed, which appeared from the record, to wit; "On motion of J. Atkinson, voted to build a new school house in said district." "Voted, to choose a committee of three persons, to be denominated the building committee." And three were appointed. "Voted, that said committee may agree upon a location, and plan, and the probable expense of said school house; or the expense of repairing the old one, and report at the next regular meeting.

It further appeared, that at a regular meeting of said district, (duly warned,) held on the third day of February 1851, and in the warning of which were among other articles the following; "1. To choose a moderator to govern said meeting. 2. To hear the report of the committee raised at a former meeting. 3. To see if the district will raise money to build the said house. 4. To

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see if they will raise money to repair the old house. 6. To see if the district will direct the location of their school house. And 7. To raise a new committee, or instruct committee in any matters pertaining to the affairs of the said district."

Tappan Stevens was chosen moderator and among other matters, the following are recorded. "Voted, and accepted a verbal report from Simeon Stevens, Jr., one of the committee. Voted, to pass over the 3, 4, 5 and 6, articles for the present; and act on the 7. Voted, to elect an addition of two to the building committee, who were elected at a former meeting; voted, to choose Joseph Atkinson and Austin A. Avery, as the addition to said committee. Voted, to instruct said committee, to prepare a plan of said school house, and report at the adjourned meeting, together with the probable expense of building the same and its location." That this meeting was duly adjourned to the 7th day of February, 1851, 6 o'clock P. M., at which time the district met, and said committee made a report in writing; the said report was accepted, and the 3d article taken up. "Voted, to raise the sum of \$500, on the poll and ratable estate of the inhabitants of said district No. 8, for the purpose of building a new school house in said district." On motion, "voted, to restrict the committee in the sum of \$600, for the finishing of said house; voted, to adopt the report, and that the committee carry out their plan in the building of said house, and that half the sum raised be paid over by the first day of June next, and the other half by the first day of October next." And the meeting adjourned without day.

It further appeared, that immediately after said meeting the building committee proceeded to make contracts for building said house, and at the time of holding what was called the rescinding meeting herein after mentioned, the committee had made contracts and bought lumber for the house, and drawn it to the ground where the house was to be placed.

It also appeared, that the plaintiff all along opposed the building of a new house, and raising money for that purpose; assigning as a reason, that it would cost too much, and at a rescinding meeting, so called, of the district, held on the first day of March, 1851, the plaintiff told the district, that he would never make up said tax, as prudential committee, and never would pay his tax. That the plaintiff further told them, that they had no right to place the

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house on the site where the state house stood, that being the place selected by said committee.

It appeared, that plaintiff did refuse to assess the tax raised, for building said house. That the district were never told till said rescinding meeting, that they had no right to build there; but, supposing they had the right to do so, they went on by their said committee, in good faith, and erected the house. That they had kept their school in a house on the common for the last fifty years, and in the house previous to this new one twenty-two years, but on a different part of the common.

It appeared, that the town of Newbury, at their annual March meeting, held on the 4th day of March, 1851, voted a new school district, called district No. 22, composed in part of the territory of district No. 3; and the plaintiff and his land came in the limits of No. 22. That said district was organized, but at the next annual March meeting, of said town in 1852, was set back to district No. 3, and re-annexed to it.

That the selectmen of said Newbury, on the 10th day of March, 1851, on application of said district No. 3, regarding the office of prudential committee vacant, as well by plaintiff's declining and refusing to assess the tax aforesaid, as by his being included in and being a member of district No. 22, appointed Simeon Stevens, Jr., prudential committee of district No. 3, which appointment was in writing. That said written appointment was immediately put into the hands of the said Simeon Stevens, Jr., and by him handed to the clerk of district No. 3, which has by said clerk been kept on file ever since, but not recorded.

That said Simeon Stevens, Jr. took upon him the duties of prudential committee, and assessed and apportioned said \$500, so raised, among the tax payers of said district No. 3, and made out and signed a rate bill of the same in due form, and procured a warrant to be annexed, and put the same into the hands of the defendant, as collector, on the 30th day of May, 1851, for collection, in which tax bill the plaintiff was rated, and his tax was \$21.86.

It appeared, that the defendant called on the plaintiff several times and demanded his said tax, but the plaintiff uniformly declined, saying he would never pay the tax, and that it was illegal.

That defendant thereupon levied the said rate bill and warrant

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on the wagon in question ; but plaintiff immediately replevied the same.

It also appeared, that after said house was completed, the building committee were indicted, for erecting said house as a nuisance, and were convicted. That said district whenever they called meetings of the same, inserted an article in the warrant to choose a moderator, and elected one without any reference to the moderator elected at the annual meeting ; that this was their uniform practice, but it did not appear that the moderator elected at the annual meeting was present at any meeting, except that at which he was elected moderator, on the 30th day of September, 1850.

It also appeared, that the plaintiff sent the said building committee a written communication signed by him, as town agent, to the purport, " that if they built the school house on the spot where the old state house stood, they must suffer the consequences," which the committee deemed a threat ; but this was after the foundation of the house was laid, and the sills leveled, and the timber got on to the ground.

The County Court, June Term, 1843,—COLLAMER, J., presiding,—upon the foregoing facts, rendered judgment for the plaintiff for one cent damage and his costs.

Exceptions by defendant.

A. Underwood for defendant.

I. School district No. 8, from the length of time it has been recognized as such, and transacting business as a district will be presumed to have been properly organized. *Barnes v. Barnes*, 6 Vt. 398. *Thomas v. Gibson*, 11 Vt. 607. *Sherman v. Bugbee*, 16 Vt. 498.

II. The exceptions show a legal meeting, and proper vote for building a school house, as also for raising \$500, for the purpose of building the same.

III. The location of the house, was in *good faith*. The fact, that plaintiff informed the district, they had no right to locate it there, was mere matter of opinion, and an after thought. To hold that any member of the district may repudiate his tax, because the district happened to be mistaken in their right, would be indeed a hardship, as much so as if they had purchased land for the house, and the title chanced to fail.

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The house itself is not lost to the district, but may be used in another location, and it is not for the plaintiff who has the beneficial use of the house, in common with the rest of the district, to say he will not contribute to the expense, because the district chanced, under a mistake of their rights, to erect the house in what turned out to be the highway.

IV. The fact, that the moderator chosen at the annual meeting, did not preside as moderator at the meeting voting the tax, does not invalidate the tax, and render its collection illegal. It does not appear that the moderator chosen at the annual meeting was present, and if he is to be regarded as the proper officer to preside when present, his absence is to be presumed, if another chosen for the purpose did preside. It was customary with this district, (as it is believed to be with most or all other districts in the state,) to choose a moderator for each meeting, and the recent statute, giving districts power to elect a moderator, it is believed is merely in affirmance of the law, as it was before. See Act of 1852 p. 39. *Tucker v. Aikin*, 7 N. H. 114.

V. It will be claimed by the plaintiff, that there was no vacancy in the office of prudential committee, authorizing a new one to be appointed to assess the tax and discharge the other duties of committee.

The defendant insists, that there was a vacancy. 1. From plaintiff's refusal to act. 2. From the fact of his being set off to district No. 22. By the Comp. Stat. 146 § 20, the selectmen may fill a vacancy, which has occurred from any cause. It is difficult, (in a common sense view of the subject,) to see why a *flat refusal to do the duties of an office*, does not make a *vacancy* of it, as much as *removal, sickness, or insanity*. Again, the refusal of the plaintiff to act as committee, may be regarded as a *resignation* of the office, and the district procuring *another appointment*, as an acceptance of it. This may be done *expressly* or by implication. *Angel & Ames on Corporations* 424-5-6. *Cloutman v. Pike*, 7 N. H. 210. A neglect to do the duties of an office is sufficient cause of *amotion*. *Angel & Ames on Corp.* 418.

But the defendant insists, that the plaintiff was legally set off to district No. 22, thereby leaving the office of committee in No. 3, vacant. It is admitted that districts are to be composed of territory, not persons; and it is submitted that the petition in this case,

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(adopted by the town,) taken together indicates and marks *territory*, and is sufficiently certain to be established by the court. The court will make every reasonable intendment in favor of the description. In *Cutting v. Stone*, 7 Vt. 471, *territory* was not alluded to, nor any territorial bounds given, in making limits for a village; but in *Williams v. Willard*, 23 Vt. 369, territorial bounds, (though not more definite than in the present case,) were made and the village established. No one can doubt the meaning of the petition, nor would any surveyor be at a loss, from the petition, to trace out the bounds of district No. 22, as there described.

The case shows the appointment of Stevens, sufficiently recorded by the district clerk, if indeed such record be necessary.

The plaintiff's absolute refusal to pay the tax rendered it unnecessary for the collector to give time, and appoint a place to receive it. *Downer v. Woodbury*, 19 Vt. 329.

Leslie & Dickey for plaintiff.

I. We insist, that the vote raising the money and upon which the tax was assessed was void. *First*. Because the meeting at which the vote was taken raising the money, was not *moderated* by Charles Story, the legal moderator, no vacancy having occurred in the said office.

The mere absence of the moderator from the meeting at the time the vote was taken, did not create a vacancy in the office of moderator. The said Story was chosen for one year and until another was chosen, and he had the right to moderate *all* meetings within that period. Comp. Stat. Chap. 20 § 25.

A moderator *pro tem*, was not known to the law prior to the passage of the Act of 1851. Nor could a school district *prior* to the passage of that act, fill a vacancy in the office of moderator. 11 Vt. 618.

Second. The case finds, that at the same meeting at which the tax was voted, (Feb. 7, 1851,) and before the tax was voted, the district voted, to accept the report of its building committee, locating the school house on the public common, and did in pursuance thereof locate and build said house on said public common, and by reason of which location, it became and was a public nuisance, for which the building committee were indicted. Therefore, we insist, that

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the vote raising said tax, was for this reason *void*. It was in *fact* and *effect* raising money by tax, to create and erect a nuisance.

No person's property can be taken, nor can he be compelled against his will to contribute and pay money, and much less pay a tax voted and assessed for an illegal object and purpose.

And it is no answer to this proposition, to say that the district supposed, that they had a right so to locate the house, and acted in good faith.

II. We insist, that the assessment of the tax was void. 1. Because the office of prudential committee, did not become vacant by reason of the attempted erection of school district No. 22, into which Tappan Stevens the legal prudential committee was attempted to be set. District No. 22, was composed of persons, not territory, therefore, the proceedings erecting the district were void. 8 Vt. 402. 10 Vt. 480.

2. Nor did the office of prudential committee become vacant, because he neglected or refused to assess the tax. If he neglected or refused to perform a known duty, incumbent upon him to perform, he might be liable to a prosecution, perhaps, but it would not create a vacancy in his said office.

But he was guilty of no dereliction of duty. He was in no wise bound to assess a tax voted for an illegal purpose and object. Therefore, Simeon Stevens, Jr. had no power to assess said tax, and his appointment and acts, as prudential committee were not binding. The power of taxation is derived exclusively from statutory provisions, therefore, the requirements of the law must be strictly complied with. 2 Day's (Conn.) 550.

The object and purpose of taxation must be legal, and within the corporate powers of the corporation imposing the tax. *Drew v. Davis et al.*, 10 Vt. 506.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. In regard to the necessity of having the moderator of a school district meeting who was appointed at the annual meeting the same during the whole year; it seems to us of no importance. If it was really the object of the statute to have the moderator of such meetings hold office during the year, which seems to be the import of the ch. 20, § 25 of the Compiled Statutes, it never could have been expected, that if it became

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desirable to hold other meetings, than the annual meeting, and the moderator was not present, that his place could not be supplied, and the meeting must fail for this cause, and if the meeting proceeded, under the moderation of another, that the proceedings were not valid. The consideration, that provision is made for supplying vacancies in other district offices, and not in this, shows, that the legislature did not attach any such vital importance, to the presence of the annual moderator at all meetings, else they must have felt the essential importance, of supplying any vacancy, which might occur in that office, as well as others.

II. In regard to the vacancy in the office of prudential committee of this district, something perhaps depends upon the view we take of the legality of the tax. For if the tax was, what it is denominated by plaintiff's counsel, and what the plaintiff himself seems to have believed it to be, a tax to raise money, for the purpose of enabling the district to commit a crime, his refusal to assess the tax was no dereliction of duty. And a refusal to do a particular act, in one's official duty, in good faith, not believing it to be a duty, should scarcely be regarded, perhaps ever, as creating a vacancy in the office. If there was a power of amotion from office, which exists in regard to certain corporate officers, in England, the case might be different. One having that power might, under circumstances, feel justified in removing an officer, rather than have those interested, compelled to resort to a writ of mandamus. But where no such power of amotion exists, and the officer simply refuses to do a particular act, even one required by his duty, it has been held, in this state, not to create a vacancy in the office. *Cummings v. Clark*, 15 Vt. 657.

But we think, it must be regarded, as sufficient to vacate the office, that a new district was erected, and the prudential committee of this district included within its limits. The objection, that the new district is not defined, by intelligible geographical limits is certainly not shown in the present case, unless we are to allow intendments, and presumptions, for the purpose of creating doubts, whereas the legal presumption is in favor of the proceeding, and of all proceedings, until the contrary be shown. There can be no doubt there was an attempt to define the new district, by strict geographical limits. Most of the monuments are so specific, that there is no ground of doubt, in regard to them, and we presume

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the others will be readily ascertained, upon the ground, by following, from one given point to another, so as to include such lands, as are named. The fact, that certain persons are named, tends to create no necessary uncertainty. We think therefore, that the new appointment must be regarded as valid.

III. The only remaining question made, is in regard to the validity of the tax raised to build a school house, upon the site of the old state house. If this were a tax for the avowed purpose of erecting a nuisance, there could of course, be no question. But will the fact, that the location proved to be illegal, and that it was, upon indictment, adjudged a nuisance, render the tax illegal? The proceeding was in form an indictment, and for a technical offence against the criminal laws of the land. But in fact, it was a proceeding merely, to test the right of the district to maintain their school house in that particular spot. Although the judgment, in legal terms, was *prostertere nocumentum* practically, it only required the removal of the school house, a short distance, which no doubt could be effected, without detriment to the house, and at no great expense. The effect is certainly not very different, so far as the district is concerned, from what it would have been, if the title to the land had been decided, against them, upon a writ of ejectment, probably not as unfavorable, in the matter of removing the house, since in the present case there can be no question, in regard to that. Such a disaster is liable, at any time, to overtake any school district, in regard to the title to the land, upon which they may have recently erected their school house, or in regard to a town, in building a town house. And we do not think it should have the effect, to avoid the tax, assessed for the purpose of building a house, under such circumstances, that the title of the site is found not to be in the district. It is true, no doubt, that if we were seeking occasion to involve a public officer, in loss, or ruin, or to embarrass the operations of a municipal corporation, by urging a degree of strictness, in the pursuit of their legal rights, which no man could accomplish, short of the power of prophecy, we might very readily adopt a course of construction, and argument, which would render this tax void. I have no doubt some such decisions may be found. But upon what rule of reciprocity, or courtesy, or justice, it was ever considered, that the judgment of courts of record, were to be held exempt from all presumptions of error,

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and that subordinate officers should be straightened up, to a discipline, before which no human sagacity is adequate to stand, I could never comprehend, unless it were to make amends for our own impunity, by the severity of our judgments, in regard to the conduct of other public officers. By this it is not meant, that any public officer is entitled to any thing more than reasonable intendments in his favor, the same that we apply to the proceedings of courts. This is the rule now, in all courts, not only in regard to matters of record, but as to the proceedings of all public officers, and it is one which is fairly entitled to be carried out. And upon this basis we think, so far as appears, in the present case, the tax must be regarded as legal.

Judgment reversed, and case remanded.

DANIEL TARBELL, JR. v. FRANCIS STURTEVANT.

Promissory note. Indorsement, its effect. Indorsee & maker. Evidence.

If the payee of a promissory note indorses and delivers the same to the indorsee, as collateral security for money advanced, the indorsement is irrevocable, and it vests the title to the note in the indorsee, and also the right to recover the whole amount due on the note against the maker.

And in such case, the indorsee would hold the surplus, after payment of his claim, as trustee of the payee of the note, or of his assignee.

In a suit brought by the indorsee of the note against the maker, testimony tending to prove, that the payee of the note has assigned his interest in the note, and that the indorsee holds the note as collateral security, and that the assignee has tendered to the indorsee the amount due to him from the payee, is inadmissible, and constitutes no defense for the maker of the note, as he must pay to the person legally entitled to receive it, and to the one the payee has ordered the contents of the note to be paid to.

In a suit by the indorsee against the maker of a promissory note, controverted matters, between the indorsee and payee, or one having his interest, cannot be properly determined, if the maker is a stranger to the transaction, and it in no way effects his liability on the note.

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ASSUMPSIT upon a promissory note, for \$300, dated the 8d day of November, A. D. 1850, and made payable to one Smith D. Sturtevant, or order, in six months, and sued by the plaintiff as indorsee.

Plea, the general issue, and trial by jury.

On the trial, the plaintiff gave in evidence the note declared upon, and proved its indorsement, by Smith D. Sturtevant, the payee, and rested.

The defendant then offered to prove, that the plaintiff received the note in suit from the payee, Smith D. Sturtevant, on the 11th day of November, 1850, as a pledge, or collateral security, for the sum of \$125, then loaned by plaintiff to the said Smith D. Sturtevant; and that he then executed and delivered to said Smith D. his receipt for said note, specifying that he held it as such collateral security; that on the first day of Dec., 1850, Smith D. Sturtevant sold to one David F. Chapman, all his, the said Smith D.'s interest in said note and receipt, for a valuable consideration, and delivered to said Chapman the plaintiff's said receipt for said note, and also executed a written assignment to said Chapman of his, said Smith's title and interest in and to said note and receipt. That on the second day of December, 1850, said Chapman gave due notice to said Tarbell, the plaintiff, that he had thus purchased the interest of Smith D. Sturtevant in the said note. That subsequently, and before the commencement of this suit, said Chapman tendered to the plaintiff the amount of the plaintiff's lien upon said note, which sum the plaintiff refused to receive; that the writ in this suit was served upon the defendant the 8d day of June, 1851; and that on the 5th day of June, 1851, said Chapman tendered to the plaintiff the full amount of the principal sum, \$125, loaned by the plaintiff to said Smith D. upon the pledge of the note, as above mentioned, together with the interest thereon and also the costs which had then accrued in this suit, and demanded the said note; that the plaintiff refused to receive the sum so tendered, or to deliver to said Chapman the said note; and that said Chapman thereupon, on the same day, commenced an action of trover against the plaintiff for said note, which suit is now pending; and that this suit is now prosecuted upon said note, without the consent and against the will of said Chapman.

To the admission of this testimony the plaintiff objected, and

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the court,—COLLAMER, J., presiding,—excluded the same, and directed the jury to return a verdict for the plaintiff, for the full amount of the note and interest.

Exceptions by defendant.

Hebard & Martin for defendant.

I. Had the plaintiff any interest in the note, by which he had a right to retain it?

If he had not, then could he maintain an action upon it against the maker?

We insist, that after the tender, he had no more right to retain the note than if he had found it in the street. At first he only had a special and limited interest in it, which was extinguished by the tender.

If he had accepted the tender, we suppose it would not be claimed that he could retain it, or maintain any action upon it.

II. Suppose Smith D. Sturtevant had given the maker a discharge, and the maker had then tendered to the plaintiff all his interest in the note. Would it then be claimed that the plaintiff could maintain an action against the maker?

III. Can it make any difference by whom the tender was made, provided it be made by one having an interest in the note? And does not a sale of the note to Chapman, as effectually defeat the plaintiff's action as a discharge by the payee?

IV. Why should Tarbell be allowed to recover the note after he had ceased to have any interest in it, or any legal right to retain or control it?

V. Chapman having made the tender, is bound to keep it good, and plaintiff may demand it of him whenever he chooses.

J. S. Marcy for plaintiff.

The evidence detailed in the bill of exceptions was properly excluded, and the verdict rightly ordered for the plaintiff, as there was no evidence offered which tended to constitute a defense. The tender and refusal did not divest Tarbell of his interest in the note.

Whether the transaction between plaintiff and Smith D. Sturtevant, and between him and Chapman, were as defendant claimed and offered evidence to prove, or not, was wholly immaterial to

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the issue in this case. This defendant was not privy to, nor interested in, nor at all affected by them and cannot avail himself of them as a defense, unless a fraudulent possession of the note by the plaintiff is shown, of which there was no evidence or pretence. 4 U. S. Dig. 369 § 159. Supt. U. S. Digest Vol. 2 p. 648 § 1062, refers to *Guernsey v. Burns*, 25 Wend. 411. U. S. Annual Digest Vol. 4 (1850,) p. 371 § 194, refers to *Aspinwall v. Myer*, 2 Sanford 180.

The defendant's rights are not prejudiced by a suit in the name of this plaintiff, whoever might be the owner of the note.

The plaintiff had an interest in this note at the time this suit was brought even if the tender and demand made afterwards and offered in evidence cancelled that interest, which is denied.

A judgment on the note in favor of this plaintiff will be a bar to an action on the same by Chapman or any one else; and Chapman's remedy, if he has any claim, is by action against the plaintiff, which, this case shows, is already instituted and pending; and whether it avails him as a remedy or not, depends very much on what he shows on the trial, as we conceive of it—*Secundum allegata et probata*.

Chapman, as the case shows, knew that plaintiff claimed title to the note, as early as December, 1850, and knew that plaintiff had sued defendant for the recovery of the note, as early as June 5th, 1851, and before this suit was entered, but took no measures to notify defendant of his claim to the note, or to prevent the plaintiff recovering judgment in this suit, but relied on his remedy against Tarbell. *Hackett v. Kendall*, 23 Vt. 275.

The opinion of the court was delivered by

ISHAM, J. The judgment of the county court in this case must be affirmed. The evidence offered by the defendant, *as between these parties*, was properly rejected. If this suit had been brought against the payee of the note, who was the plaintiff's immediate indorser, the testimony possibly would have been admissible; for as between them, the effect of the tender, whether made by him or Mr. Chapman as his assignee, would directly arise. The plaintiff's interest in the note, as against the payee, was only to the extent of the money loaned or advanced, and a recovery would be limited to that amount. This suit, however, is not between these

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parties, but is brought by the indorsee against the maker of the note. The question arises whether these facts constitute a defense for him; in other words, is the defendant as maker of the note, absolved, by that tender, from all legal obligation to pay it to the plaintiff, to whom the payee has directed it to be paid. On this question, it is to be observed, that the defendant does not pretend but that he justly owes the debt, or that he has any defense, legal or equitable, which should shield him from the payment of it to some one. It is therefore quite immaterial to him, to whom he pays it, or who recovers upon it, provided when the payment is made, or a recovery had, it will bar any further claim on the note by others. When the maker has a good defense to the note as between him and the payee, but is prevented from making it, in consequence of the note having passed into the hands of an indorsee, it may be proper to show the circumstances under which the indorsement was made, as that it was indorsed to him past due, or that he is not, for other reasons, the *bona fide* holder of the note. This evidence may be proper in many cases, for the purpose of subjecting the note in the hands of the indorsee to a defense existing between the original parties. Aside from that consideration, where there is no illegality in the transaction, we apprehend, such testimony is inadmissible. There is a manifest impropriety in determining the controverted matters between the indorsee and the payee, or one having his interest, in a suit against the maker of the note, when the maker is a stranger to the transaction, and which in no way lessens, or affects his liability on the note.

The indorsement, in this case, was an order upon the defendant, and a direction to him, by the payee, to pay the amount of that note to the plaintiff; and as it was indorsed for money then paid or advanced, that indorsement was irrevocable. Chitty on Bills 268. It could not have been indorsed for a less sum than was due on its face. Smith's Mer. Law 274. *Douglas v. Wilkinson*, 6 Wend. 637. Chitty on Bills 262. Its legal effect, therefore, was to vest in the plaintiff the title to the note, and the right to recover the whole amount due thereon, as against the maker, and hold the surplus, after the payment of his claim, as trustee for the payee, or Mr. Chapman as his assignee. In the case of *Bowman v. Wood*, 15 Mass. 584, the note was received as collateral security for a debt which was in the plaintiff's hands as sheriff. In that

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case the court remarked "that the note was put into his hands as a pledge, with the name of the promisee indorsed upon it. This was a transfer sufficient to enable the plaintiff to maintain the action; for the indorsement comprehended an authority to bring a suit, and to receive the money of the promisor." The general rule is now well sustained by authorities, that when one receives a note as collateral security for money advanced at the time of the indorsement, or for any consideration then arising, the holder is treated as having received the note for value, and is entitled to recover the amount of the maker. Story on Bills § 192, and note 8. *Bosanquet v. Dadman*, 1 Starkie 1. Spring's Appeal 10 Barr. 235. *Swift v. Tyson*, 16 Peters 15.

We are satisfied from the authorities, that the title of the plaintiff to this note is sufficient to enable him to recover the amount of the maker, and that a payment to him will be a discharge of the maker's liability to others. Under these circumstances, the fact that it was received as collateral security for money then advanced, does not alter his liability to pay the note to the plaintiff. The testimony, so far as the maker of the note is concerned is wholly immaterial, and was properly rejected. It is the duty of the maker of the note to pay it to the person legally entitled to receive it, and to whom the payee has ordered its contents to be paid; and leave the plaintiff and the payee, or Mr. Chapman as his assignee, to settle their conflicting claims between themselves. Judgment affirmed.

CHARLES McDUFFIE v. JOHN MAGOON, JR. & HORACE
FIFIELD.

Promissory Notes. Condition. Evidence.

A condition to a promissory note, that if the amount of the note is not *legally* due, upon certain other notes, which are named in the condition, upon which payments had been made, this note is not to be paid, otherwise it is to be paid, is in the nature of a defeasance or condition subsequent, and is for the benefit of the makers, and the burden of proof will lie upon those, for whose benefit the condition was annexed.

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It is not admissible to show by *parol evidence* that the notes named in the condition, were by mistake originally made too large; nor is it competent to show by *parol evidence*, that the contract was different from that expressed in the note.

But if the mistake is apparent on the face of the contract, when taken in connection with the note, it will be a defense to that extent.

In cases where nothing appears to show upon which count a verdict is taken, and some of the counts are good, and some bad, the presumption is, that the verdict was upon the good count. *Whitcomb v. Wolcott*, 21 Vt. 388.

ASSUMPSIT on a promissory note.

Plea, *non assumpsit* and issue to the court.

On the trial the plaintiff read in evidence the note, of which the following is a copy:

"March 17, 1853. For value received I promise Charles McDuffie, to pay him or bearer twenty-three dollars and eighty-seven cents, on demand, with interest annually. Provided however that if said sum of \$23,87 is not legally due to Joseph Bell's estate, on seven promissory notes, signed by John Magoon, Jr., in all for \$324,90—dated March 10, 1842, and specified in a contract of that date, between Joseph Bell and said John Magoon, Jr., according to the conditions of said contract, in addition to the sum of \$128,26, paid on said notes Feb. 26, 1852, and \$439,39 paid on those notes this day, then the said sum of \$23,87, as described in the above note, is not to be paid, otherwise it is to be paid.

(Signed.)

"JOHN MAGOON, JR.

"H. FIFIELD, Surety."

The execution and delivery was conceded by the defendants, and the plaintiff gave no further evidence in the case.

The defendants then read in evidence a writing signed by Joseph Bell, of which the following is a copy: "I agree with John Magoon, Jr., to make the deed within named on his payment to me of his seven promissory notes of this date, for \$324,90 on demand; \$50 by January 1, 1843; \$50 by January 1, 1844; \$50 by January 1, 1845; \$50 by January 1, 1846; \$50 by January 1, 1847; \$50 by January 1, 1848, and the interest on the same annually, and all taxes I may have to pay, since April 1, 1840.

"March 10, 1842. (Signed.)

"JOSEPH BELL."

The foregoing writing was upon the back of a contract or

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agreement made by one John McDuffie for said Bell, with the defendant, Magoon, by the terms of which agreement the said Magoon was to have a deed of certain lands in Topsham, upon the payment of the said notes executed by said Bell. The lands were described in said agreement, and also the notes and time of payment.

The defendant offered parol evidence tending to prove that the notes, made to said Bell, and described in the said writing so signed by said Bell, were agreed to be, and intended to be made for the amount agreed on in the agreement made and signed by John Magoon, Jr., and said John McDuffie; but that by mistake in casting interest from the wrong time, said notes were made too large by a sum greater than twenty three dollars and eighty-seven cents.

To the admission of this evidence the plaintiff objected, and the same was excluded by the court. To which decision defendants excepted.

The County Court, January Term, 1854,—COLLAMER, J., presiding,—found that defendants did assume and promise, &c., and the defendants filed a motion in arrest of judgment, which was overruled by the court.

Exceptions by defendants.

Leslie & Dickey for defendants.

The county court erred in excluding the evidence offered by the defendants.

Because, by the terms of the note or contract declared upon and given in evidence, the defendants had the right, if the *onus probandi* was on them, to prove just what they offered to prove, and we insist, by *parol evidence*.

The object of the condition of the note was to allow the defendants to prove by *parol* or otherwise, that the seven notes given by Magoon to Bell, were in the aggregate made too large by mistake, and therefore not legally due.

It seems to us obvious from the terms of the note, and from the facts in the case, that it was understood by the parties, that *parol evidence* might be used to show the mistake in the notes given by Magoon to Bell; and it is difficult to see how the facts could be shown in any other manner. The testimony offered would not

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alter, vary, or contradict the contract declared on ; and was clearly admissible under the authority of *White v. Miller*, 22 Vt. 380.

The testimony was admissible, as tending to show a want of consideration. 1 Greenleaf on Ev. 384 § 248. It was also admissible as tending to show, that the whole amount of the note sued was not due. *Lewis v. Gray*, 1 Mass. 297.

II. The county court also erred in finding that defendants did assume and promise, and in rendering judgment for plaintiff. Because, the evidence of plaintiff was not sufficient for that purpose. By the terms of the note, the plaintiff should have *alleged* and *proved* that the sum of money specified in the note declared on, was legally due on the seven promissory notes given by defendant, Magoon, to Bell, and referred to in the condition of said note and without proving that fact, the plaintiff was not entitled to a judgment.

The Supreme Court will revise and correct a judgment and finding of the county court, if the case shows that the whole of the testimony given was clearly and legally insufficient to support such a finding and judgment. *Emerson v. Young*, 18 Vt. 603.

III. The first count in plaintiff's declaration is defective, as it does not allege that the sum of money specified in the note declared on, or any other sum of money was legally due on the seven promissory notes given by defendant, Magoon, to Bell, and referred to in the condition of the note sued. It was necessary that it should have been so *alleged* and *proved*, in order to entitle plaintiff to a judgment.

The plaintiff did not set forth a cause of action, and therefore no presumption can be made, to sustain the finding of the court.

The case shows, that the only testimony given in the case was on the first count, which is defective, and the recovery of course, was had on the defective count, therefore judgment should have been arrested. *Needham v. McAuley*, 18 Vt. 68. *Camp v. Barker et al.*, 21 Vt. 469.

J. W. D. Parker for plaintiff.

The offer of the defendants to show by parol, that in casting interest, by mistake from a wrong time, said notes were made too large, was but to add to, vary, contradict, explain, or show mistake in the settlement of 1842, between Bell and Magoon, and therefore most clearly inadmissible.

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The same rule of law must exclude the evidence offered, to prove that the notes made to said Bell were agreed, and intended to be made for the amount agreed on in the writing on the opposite side of the same paper. The authorities are strong and uniform on this point. *Bradley v. Anderson*, 5 Vt. 152. *Bradley v. Bently*, 8 Vt. 248. *Reed v. Wood*, 9 Vt. 285. *Isaacs v. Elkins*, 11 Vt. 609. *Raymond v. Roberts*, 2 Aik. 204. *Jones v. Webber*, 1 D. Chip. 215. *Brown v. Beebe*, 1 D. Chip. 227. 1 Swift's Dig. 180. 1 Greenleaf on Ev. § 275, 276. 3 Wilson 275.

As to the motion in arrest. The issue in this case was joined to and tried by the court. It is even doubtful whether a motion in arrest can be interposed, at all, when the issue is formed, on trial by the court, as in *Bliss v. Arnold et al.*, 8 Vt. 252. *Lincoln v. Blanchard*, 17 Vt. 467.

If any count in the declaration of several, is good and the others defective, and a general finding for plaintiff, as in this case, by the court, on motion in arrest, the court will sustain the finding, unless it in some way appear. which it certainly does not in the case at bar, that the finding was on the defective count. *Whitcomb v. Wolcott*, 21 Vt. 368. *Camp v. Barker et al.*, 21 Vt. 469.

Where all the counts in a declaration are for the same cause of action, but some of them are defective, and a general verdict is rendered for the plaintiff, the verdict may be applied to one of the good counts. *Payson v. Whitcomb*, 15 Pick. 212.

The failure to oblige the performance of a condition precedent in an action on an agreement, is cured by verdict. *Bayley v. Clay*, 4 Rand. 346.

The opinion of the court was delivered by

REDFIELD, Ch. J. This is an action upon a note, with a certain condition annexed, in substance, that if the amount of the note is not *legally* due, upon certain other notes given by defendant, Magoon, to Joseph Bell, upon which certain payments had been made, this note is not to be paid, otherwise it is to be paid. This condition is clearly in the nature of a defeasance, or condition subsequent, and for the benefit of the makers of the note, and where the burden of proof would lie upon those, for whose benefit the condition was annexed. And how is this to be made out? The words of the condition are "legally due." These words have a determinate signification, from which we are not at liberty to de-

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part. The amount legally due upon a note might, in various modes, be affected by parol evidence, or by showing fraud, or want of consideration, or payments, not indorsed. But such evidence is not competent to show, that by mistake the notes were originally made too large. Such evidence no more shows a failure, or want of consideration, than when a note is given for one sum, as the price of a chattel sold, it makes out such a result, by proving that the price was in fact agreed to be less. The evidence, in both cases, shows the contract to be different, from that expressed in the note. Of this character was the evidence offered by the defendants. That the interest was reckoned from one time, when it should have been from another, is only showing a mistake, in the note, and really establishing a different contract. And it has repeatedly been decided, by this court, that such evidence is not competent, to defeat a note, at law. Such evidence had no tendency to show the amount "legally due" upon these notes, and was therefore properly rejected.

If the contract, in connection with the notes, showed the mistake clearly, without the necessity of the resort to parol evidence, the defense might probably be received. But we do not understand, that this appears from the contract, in connection with the notes. For something else might have been included in the notes, not specified in the contract, or the parties might have modified the written contract, at the time of executing the notes.

This point virtually disposes of the whole case. For if the burden of proof is, upon the defendants under this condition, then the count to which the proof seems to have been applicable, was sufficient. We could not here allow any presumption, that the verdict was taken upon the other counts, inasmuch as from the whole case, it appears the evidence was solely applicable to this count. In cases where nothing appears to show upon which count a verdict is taken, and some of the counts are good, and some bad, we now allow the same presumption, in favor of the proceedings, which we do in favor of all other proceedings of this character, and which was always allowed even in criminal proceedings, that it is more likely that the verdict was taken upon the good counts, than upon the bad ones. *Whitcomb v. Wolcott*, 21 Vt. 368, and other cases cited in argument.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF LAMOILLE.
APRIL TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

THE TOWN OF STOWE v. THE TOWN OF BROOKFIELD.

Paupers. Order of removal, its effect, &c.

An order of removal of a pauper, notified to the town, to which the order is made, within thirty days, according to the statute, conclusively fixes the settlement of the pauper, unless appealed from.

It is the same as any other judgment, as to its conclusiveness, when the order is regularly made, and notice properly served upon the adversary town.

An order of removal regularly made, and properly served upon the adversary town, and unappealed from, is conclusive of the settlement of the pauper at its date, and to change the settlement by residence, that which is subsequent, in point of time to the order can only be taken into the account.

Stowe v. Brookfield.

THIS was an appeal from an order of removal of one Barney Smalley, with his wife and family from said Stowe, to said Brookfield, made by two justices of Stowe, on the 11th day of March, A. D. 1853.

Plea, that the paupers were unduly removed, because their last settlement was not in said Brookfield, and trial by the court.

It appeared on trial, that the paupers sometime in 1842, then having a settlement in the town of Brookfield aforesaid, moved from said Brookfield, into the said town of Stowe and there resided for more than seven years continuously, without becoming chargeable to either of said towns, and during all that time supported and maintained themselves and did not become chargeable, until about the time the said order, in 1853, was made, otherwise than by the expense the town of Stowe may have incurred in making a certain order of removal in 1848.

It also appeared, that on the 16th day of September, A. D. 1848, an order for the removal of said paupers, from said Stowe to said Brookfield, on the ground that said paupers were likely to become chargeable, was made by two justices of Stowe; a copy of which order certified by the justices making it, it was admitted on the trial, was delivered by the town of Stowe, by one of the citizens of said Stowe to the overseer of the poor of said Brookfield. Whether such citizen had any special authority from either of said justices to deliver the same was not shown, but no question as to such authority was made on trial. It appeared, that this copy was thus delivered within the thirty days from the date of the said order; that the paupers were not removed under this order, nor was there any appeal taken from the same.

The County Court, June Term, 1853,—PECK, J., presiding,—on the facts, decided as matter of law, that the paupers were duly removed.

Exceptions by defendants.

Peck & Colby for defendants.

We submit that the paupers have acquired a settlement in Stowe, under the 8th article of the Act of 1817, (Comp. Stat. 128,) which provides, that if "any person having a settlement in any town in "this state and of full age, who shall hereafter reside in any other "town for the term of seven years, and during said term shall

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"maintain himself and family and not become chargeable to either of said towns, shall gain a settlement in the town in which he may so reside."

The case shows, that the paupers had a settlement in Brookfield. That he removed to *Stowe* and there resided for more than seven years with his family *without becoming chargeable to either of said towns*. This fixes the settlement in *Stowe*, unless the order of removal made in 1848, is to be regarded as interrupting the residence. That order was made on the ground that the paupers were *likely* to become chargeable, and just before the seven years had expired, but was never executed. These facts show, beyond all question, that the order was made, not on the ground of any apprehension that the paupers would soon become chargeable in fact, but with the view of preventing their residence ripening into a settlement. Can it have that effect? An order unappealed from is conclusive upon the towns as to all facts found by the order, as they existed at the time the order was made.

In this case, the order finds that the paupers' settlement was in Brookfield, and that they were *likely* to become chargeable. The settlement at the time the order was made was in Brookfield; but the paupers were acquiring by residence a settlement in *Stowe*. The order did not affect that residence. They continued to reside in that town until the seven years had expired, supporting themselves. A removal in fact, whether under the order, or for other reasons would of course have interrupted the residence. So if the order had found that the paupers had become chargeable, that would have prevented the residence conferring a settlement.

The statute does not provide that if the paupers are poor and *likely* to become chargeable, a seven years residence shall not give a settlement. The statute, in this particular, does not distinguish between the rich and poor. No matter how rich or poor a man is, if he resides seven years in a town without becoming chargeable, and supports himself and family, he gains a settlement. How then on principle can an order of removal based on the fact that a person is likely to become chargeable affect the residence?

The act of 1817, also provides that if a person holds for two years certain offices in a town, that, shall confer a settlement. Would an order like the one in the present case made while an individual was holding such office prevent his obtaining a settle-

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ment under this provision of the statute? This would hardly be claimed, and yet it is difficult to see why its effects should not be as potent in one case as in the other. *Salem v. Andover*, 8 Mass. 436. *Rex v. Inhabitants of Filloughby*, 1 Term 709. *Berkeley v. Taunton*, 19 Pick. 480. *Standish v. Gray*, 6 Shepley 92.

All that is necessary to gain a legal settlement, by seven years residence, is, that the pauper should have his permanent domicil for seven consecutive years, in the second town and keep himself and family from becoming chargeable to either town. *Tunbridge v. Norwich*, 17 Vt. 493.

Geo. Wilkins for plaintiffs.

The only question made or presented by the bill of exceptions, in this case, is as to the effect of the order of removal made in September, 1848, which was duly served, and from which no appeal was taken by the town of Brookfield.

I. It is insisted, that the effect of that order, made, served, and unappealed from as it was, not only fixed the settlement of the pauper, Smalley, in the town of Brookfield, at the time it was made beyond all further dispute and litigation, but suspended the effect of the continued residence in the town of Stowe, for the purpose of acquiring a settlement therein, for such a length of time at least, as was given to that town by law, to notify the adverse party of its proceedings.

That an order of removal, properly served and unappealed from, fixes the settlement of the pauper in the town to which the order is made just as conclusively as an express adjudication on the subject, is a proposition so well settled, that authorities are not required to support it. *Marshfield v. Calais*, 16 Vt. 598. *Brain-tree v. Westford*, 17 Vt. 141.

If the doctrine, insisted upon by the defendants, be correct, then in no case can an order of removal amount to any thing when the pauper has not become chargeable, unless an actual removal is made within seven years from the commencement of the residence.

But we insist, that when the order of removal was made, the effect of the pauper's residence for the purpose of acquiring a settlement in the town of Stowe, was superseded, at least, for the length of time within which a certified copy must be delivered to the overseer of the town of Brookfield. And that the effect of

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the residence being interrupted, no matter for how short a time, a residence of seven years after such interruption would be required to gain a residence in the town of Stowe. Had the pauper been actually removed to the town of Brookfield, though he had returned to Stowe, the next hour, it would be at once admitted, that this would be such an interruption of the residence as would prevent the paupers acquiring a settlement in Stowe. *Rex v. Inhabitants of Keshworth*, 2 Ves. 598. *Rex v. Lund*, 18 Law Journal, cited in 7 Harrison's Digest 1154.

II. The case finds, that the pauper did actually become chargeable to the town of Stowe, before he had resided there seven years.

To prevent his acquiring a settlement in the town so as to fix it with the liability of bearing the burden of their relief, which the adjudication of the justices determined he was likely to need at some future time, the town of Stowe was under the necessity of subjecting itself to the expense and charge of procuring an order of removal to the place of his legal settlement; and by putting the town to this necessary expense, the pauper became chargeable, or the subject of expense and charge.

The opinion of the court was delivered by

REDFIELD, Ch. J. It has always been considered that an order of removal notified to the town, to which the order is made, within thirty days, according to the statute, conclusively fixed the settlement of the pauper, unless appealed from. It is the same as any other judgment, as to its conclusiveness; and in addition to the force of other judgments *inter partes*, it has the effect of a judgment *in rem*, as to the settlement of the pauper, as to other towns, in the state. And as to the parties certainly, it would not be competent to defeat its effect, by showing fraud even in its procurement. And I have not been able to find any case, where its binding effect, in regard to settling the question of the pauper's legal settlement has been made to depend, at all, upon the actual removal of the pauper. For some purposes this is made indispensable to the full effect of the adjudication, as for instance enabling the town making the order, to recover expenses, incurred in support of such pauper while unable to be removed. But for general purposes the order itself, if regularly made, and notice is

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properly served, upon the adversary town, and no appeal is taken, is conclusive. *Dorset v. Manchester*, 3 Vt. 370. *Rupert v. Sandgate*, 10 Vt. 278. *Fairfield v. St. Albans*, Brayton 176.

Where the copy of the order of removal is properly served upon the adversary town, according to the requisitions of the statute, the appeal *must* be taken to the next term of the county court, and if not so taken the adjudication has been held to have become so far conclusive, as to preclude any appeal from the actual removal. While if no such copy of the order shall have been seasonably served, upon the adversary town, an appeal may be taken, whenever it is served, or when the actual removal is made, if that is the first opportunity which they have had to appeal. *Dorset v. Rutland*, 16 Vt. 419. *Marshfield v. Calais*, *id.* 598. *Braintree v. Westford*, 17 Vt. 141. *Landgrove v. Pawlet*, 18 Vt. 325.

From all which, we conclude, the proceedings in this case must be regarded as conclusive of the settlement of the paupers at its date irrespective of the anterior facts in the case, and that to change the settlement, by residence, that must be taken into the account only, which is subsequent to the order, in point of time.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ORLEANS.
APRIL TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

NATHANIEL WEST v. GEORGE R. HOLMES.

Wager. Money lost by wager, &c.

Money lost upon a wager, does not come within the 12th section of chap. 110, Comp. Stat., as to money being lost at a "game or sport."

But all wagers are held illegal in this state; and the party making the wager, and depositing the money in the hands of a stake-holder, may, by demanding it back, at any time before it is paid over to the winner by his assent, entitle himself to recover the money.

If the money is paid over to the winner, by the consent, express or implied, of the loser, he cannot recover it back.

West v. Holmes.

If the stake-holder pays the money over to the winner, after the other party has demanded it of him, the stake-holder will be liable for the same, or the loser may pursue the money into the winner's hands, or into the hands of any other person to whom it comes.

ASSUMPSIT for money had and received.

Plea, the general issue, and trial by the court.

On the trial, the plaintiff read in evidence the statement of one Joseph Woolley, from which it appeared that the defendant, Geo. R. Holmes, of Stanstead, in Canada, came to said Woolley's house, at Derby Line, and enquired of said Woolley, if he got what he, Woolley had told him he did, for three horses that said Woolley had sold in Boston; that Woolley told him that he did; that defendant then asked Woolley if there was any condition to the trade, and was told that there was none. That defendant then told Woolley, that he had made a bet with the plaintiff, or was about to make one. That said Woolley publicly stated in the village of Derby Line a number of times previous to this, that he received \$500, for said horses; that the defendant stopped but a few moments at said Woolley's house, and that the stage was waiting for him, and he was going to Montreal.

The written statement of one N. T. Sheafe, was also read in evidence by the plaintiff, and was as follows; "On the 22d day of June, 1852, Mr. Nathaniel West placed in my hands, as I supposed at the time, twenty-five dollars, and Mr. George R. Holmes the sum of fifty dollars, saying they had made a bet, the terms of which I noted in writing at the time, as follows: "Holmes bet that Joseph Woolley did get five hundred dollars for the two gray horses and the Defiance mare, (meaning the three horses sold by said Woolley in Boston, a short time before,) and West bet that he did not get \$500 for them; Mr. Woolley's oath to decide the matter. Some little time after Mr. Woolley appeared before me, as notary public, and made oath that he did get unconditionally, the sum of \$500, for said animals. I on the same day exhibited to said West the affidavit of said Woolley, and told him I supposed by the conditions upon which the money was placed in my hands, it belonged to Mr. Holmes. Mr. West desired me not to pay the money over to Holmes without his being present, saying Holmes had bet unfairly, and he, West, wanted to demand the money back. I

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"said to him, that Holmes was near by, to come with me and be present. I then paid over the money to said Holmes, and West, immediately demanded the same back of Holmes; Holmes declined paying it back. The bet was made in the post-office at Derby Line. It afterwards appeared that West had handed me only \$15, and at the time I paid the money over to Holmes, I at the request of West added \$10 of my own money, which West has since repaid to me. I did not count the money at the time West handed it to me, but laid it aside by itself; the next day West asked me if he had not made a mistake, and upon counting the money I found that he had. West said he supposed he had made a mistake, because he had \$10 more in his wallet than he ought to have."

It was admitted by the defendant, that this suit was brought within thirty days after the money was paid over by the said Sheafe to the defendant, as stated by said Sheafe.

The County Court, June Term, 1853,—POLAND, J., presiding,—found the facts as above set forth, and upon said facts, rendered judgment for the defendant.

Exceptions by plaintiff.

J. L. Edwards and Peck & Colby for plaintiff.

L. Contracts of wager are treated as invalid when they contravene any rule of public policy, or any prohibition of statute law. 2 Smith's Leading Cases 260.

The wager in question comes within the spirit, if not the letter of section 12 of chap. 110, of the Compiled Statutes, and is therefore void.

When a contract of wager is void, the money may be recovered of the stake-holder before paid over, if notice be given, although the stake-holder is not liable if he pay over the money before notice. The owner does not then lose his remedy, he may recover the whole sum from the winner. 2 Smith's Leading Cases 261. 3 Penn. R. 495.

The courts of New Hampshire, have held that a wager, on a subject in which the parties have no interest, is not a valid contract. 3 N. Hamp. 152. 6 N. Hamp. 104.

All wagers in the state of Maine are void. 15 Maine 233.

The court, in the case of *Collamer v. Day*, 2 Vt. 144, seem

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to regard a wager, upon an indifferent matter even, as against sound policy.

A wager contrary to the principles of sound policy is void equally as if it contravened a positive law. 7 Johns. 434.

II. It sufficiently appears from Sheafe's statement, that West did not intend Holmes should have the money.

From Sheafe's statement, it cannot be said that the money was paid over to Holmes by West's approbation and consent.

Probably Sheafe and West both supposed, that Sheafe was bound to pay over the money by law, though against the approbation and consent of West.

The money is therefore recoverable back on general principles, and without the aid of the statute.

Sheafe had informed West, that he must pay over the money, and West might well suppose it would do no good to make a demand on Sheafe.

When one is assured that a demand will avail nothing, he is excused from making it.

The winner gets no title till the money has been paid over with the *unrevoked assent* of the loser. *Tarleton v. Baker*, 18 Vt. 9.

In this case, the plaintiff *did rescind* by giving notice to the stake-holder that he wished to recall the money, and by the demand which accompanied the payment.

H. F. Prentiss for defendant.

I. The plaintiff is not entitled to recover under the statute, because the money was not won at any game or sport, or on any horse race, nor is a wager of this kind an offense against the statute.

II. The doctrine of the law in matters of this kind is, that the courts will assist neither party; they will not assist the winner to recover of the loser, nor the loser to recover back of the winner, after he has voluntarily paid the wager. The rule is, *fieri non debet, sed factum valet*. *Howson v. Hancock*, 8 Term 575. *Vandyck et al. v. Hewitt*, 1 East. 98. *McCullum v. Gourlay*, 8 Johns. 147. *Yates v. Foot*, 12 Johns. 1.

At common law where money is deposited in the hands of a stake-holder upon an illegal wager, it cannot be recovered back after the event be decided and the money is paid over; and upon

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a legal wager it cannot be recovered back after the event is decided.

Cases above cited and Chitty on Contracts 198, and notes. *Tarleton v. Baker*, 18 Vt. 14.

It is a contract which, as long as it remains *executory*, may be rescinded; but after it is executed, the money cannot be recovered back. Like a debt of *honor*, which a party is not *legally* bound to pay, still if he pays it, he shall not recover back the money; and like the sale of spiritous liquors in violation of the provisions of the statute, the court will not enforce the claim, nor on the other hand will they relieve from the payment when it has been made. *Ball v. Gilbert*, 12 Metcalf 397.

In this case the wager was not in violation of the statute or common law; neither against public policy or good morals; and the money was paid into the hands of the defendant by the stakeholder, with the assent of the plaintiff.

Under these circumstances there is no *dictum* of law or ethics, which requires of the defendant to refund the money.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. We could scarcely regard money lost upon a wager, as coming within the sec. 12 chapter 110 of the Compiled Statutes, as being lost at a "game or sport." We suppose this refers to gaming only, and that the word sport is added to game, so as to show that game was intended to be used in its utmost extension. Still we think it was only intended to include money lost at some game or play, either of skill or chance. This is the view taken of the penal portion of the statute in *Collamer v. Day*, 2 Vt. 144, and we do not well see how any other construction can fairly be put upon the remedial portion of the statute.

II. In this state all wagers are held illegal. *Collamer v. Day*. And the law, in regard to such wagers, is very well settled. The courts do not differ essentially in regard to it. The party making such a wager, and depositing the wager in the hands of a stakeholder, may, by demanding it back, at any time before it is paid over to the winner, by his express or implied assent, entitle himself to recover the money or other thing. *Tarleton v. Baker*, 18 Vt. 9, and cases cited by ROYCE, Ch. J.

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Applying this rule to the present case, it seems to us that this money was paid over to defendant, by the stake-holder, by the consent of the plaintiff. It was done in his presence, without any objection, and when he knew that the parties were together for the express purpose of paying over the money.

It is true plaintiff did not intend to lose his right to recover the money, or, to have defendant keep it, or suppose he was to keep it, but still he must have intended to have the money paid over to defendant, and then immediately to demand it of him, supposing doubtless, that this would be sufficient to enable him to recover it of defendant. But his misapprehension in regard to the law, makes no difference, in regard to the plaintiff's rights. Having consented to have the money paid over, it makes no difference whether he demanded it in one minute, or one day, or thirty, as it seems to us. The consent to its being paid to defendant gives him the right to retain it, as the court will not interfere, after the illegal wager is consummated.

If plaintiff had demanded the money of the stake-holder, and he had subsequently paid it over to defendant, he would still be liable to an action at the plaintiff's suit, or the plaintiff might, if he so elected, pursue the money into defendant's hands, or those of any other, to whom it comes. But upon the proof, in the present case, it would certainly be undesirable to say, the plaintiff might sue the stake-holder, for paying over the money against the consent of the plaintiff.

Judgment affirmed.

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GEORGE R. HOLMES v. THE ESTATE OF HARRIET N. HOLMES.

Probate Court. Appeal, &c.

As the law now stands the Supreme Court have no general jurisdiction, in probate matters, to rehear and determine them, upon their merits.

Power to revise questions resting in discretion, which have been passed upon by the probate court, by our present statute is conferred upon the county court, which, in this respect, is but a higher court of probate.

The removal of an administrator, for any cause, within the jurisdiction of the probate court, and which is, by law, a sufficient ground of removal, is, by the statute, and upon general principles, a matter of discretion merely, and as such cannot be revised by this court.

In probate matters the Supreme Court sit merely as a court of error, the same as in cases at common law.

APPEAL from a decree of the probate court, for the district of Orleans, removing George R. Holmes, the plaintiff, administrator of the estate of Harriet N. Holmes.

On the trial the following facts were conceded, viz: That the said George R. Holmes was the husband of the said Harriet N. Holmes; and that they were married at Derby, in the county of Orleans, in September, A. D. 1845, and resided in Derby till the death of Mrs. Holmes, in June, 1846, that she died without issue. The father of Mrs. Holmes deceased before her marriage, but her mother and several brothers and sisters were living at the time of her decease and are still living. At the time of the marriage of said George R. and Harriet N. Holmes, Mrs. Holmes held several notes payable to her, which were not paid during coverture, and are still unpaid, and she left no other estate except said notes. That at the time of the appointment of the said Geo. R. Holmes as administrator, on the estate of his wife, he resided in Stanstead in Canada, and has ever since resided there.

That the mother, brothers and sisters of Mrs. Holmes reside in Derby.

The County Court, June Term, 1853,—POLAND, J., presiding,—adjudged that the said Geo. R. Holmes was properly removed as administrator by the probate court, and ordered the

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decree, removing him as such administrator, to be affirmed and certified back to the probate court, &c.

Exceptions by plaintiff.

H. F. Prentiss for plaintiff.

The ground assigned by the probate court for the removal of plaintiff as administrator, is, that at the time of his appointment he resided, and still continues to reside, out of the state, and that he was not the next of kin to said deceased, nor a creditor to said estate; *therefore* the appointment of said Holmes, as administrator was contrary to the statute, and for this reason he was removed.

1st. The statute does not require of a person, in order to make him *eligible* to the appointment of administrator, that he shall be a resident of the state, nor does it require that he shall be the next of kin, or a creditor. In certain cases it gives the preference to the next of kin, or to some one of the creditors; and in other cases, or under other circumstances, the probate court may appoint whom it pleases, without regard to kin or creditors. Comp. Stat. 386 § 4.

The intestate died in June, 1846, and letters of administration did not issue till the 5th of February, 1853; and it does not appear that there was any application for administration, till the appellant was appointed; and he was the "such other persons as the probate court judged proper to appoint." Comp. Stat. 386 § 4.

It is true that by of Chap. 50 § 13, of the Comp. Stat. as amended by the act of 1852, (No. 20, 16,) if any executor or administrator, shall reside out of this state, &c., the probate court may, *in its discretion*, order such executor or administrator to be removed.

That *discretion*, however, must be exercised in accordance with law; and if the probate court, in the use of that discretion, have gone contrary to established principles, this court, sitting as a probate court in this case, will revise that discretion and correct the order.

Now all the causes assigned by the probate court for the removal of the plaintiff as administrator, were known to the court at the time of his appointment, and I may add, without impertinence, were fully discussed before his Honor; and there was an adjudication of this question by the probate court, from which there was no appeal, and it became a matter of record, that this plaintiff was

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the proper person to administer upon this estate. There was, therefore, great impropriety in the removal. *Lawrence v. Englesby*, 24 Vt. 42.

In the language of Judge WILLIAMS, in a case somewhat similar to this, (*Wiley v. Brainard*, 11 Vt. 113,) "it would be highly inconsistent for a court of probate, at one sitting, to grant letters of administration or letters testamentary, and at another to vacate them for reasons which existed and were known to them when such letters were granted."

The appointment was not contrary to law, and therefore the reason for the removal is unsubstantial and the order should be vacated.

2d. There are, however, very potent reasons why this plaintiff is the proper and legitimate administrator on his wife's estate.

1st. He is supposed to be better acquainted with her affairs than any other person, and therefore more competent to administer upon them. By statute you give the right of administration on the husband's estate first to the wife. If there be any reason for this rule, how much more powerful and substantial must be the reasons why the husband should administer on the wife's estate. The duties and labors of administration are not such as come within the ordinary and legitimate sphere of females, but are peculiar to the business and habits of men. It is virtually an *insult* to the dignity and capacity of man to say, that the wife may administer upon his estate, but he shall not upon hers.

2d. By law he has the right to administer as the *next of kin*, or as her next friend.

There has been much discussion whether the husband is of *kin* to the wife, and much disagreement. By reference to Dr. Webster we find that the word *kin* is used for relation by affinity as well as for relation by consanguinity. If this be true, and the husband be of kin to the wife, he is the next of kin; for who is there in the wide world more nearly and dearly related to the wife than the husband? It is for him that she forsakes all other kin, and in the fullness of her joy, she most beautifully exclaims, "whithersoever thou goest I will go, thy people shall be my people and thy God my God."

Chancellor KENT, in his Commentaries, (1st. Ed. Vol. 2, 334,) treating of this subject, says, "husbands are entitled to demand

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and have administration of their wives' estates, and the law and course is to grant administration, 1st, to the husband or wife; 2d, to the children," &c.; and this same rule is laid down by Blackstone.

Kent excepts the husband, administering on his wife's estate, from those who are obliged to give bonds for the faithful execution of their trusts. (Com. Vol. 2, 335.)

The next and most lawful *friend* of the intestate is to be selected as administrator, who is interpreted to be the husband if he were not entitled at common law. Stephens' *Nisi Prius* Vol. 2, 1871. See also Hensloe's case, 9 Co. 39.

From these authorities the doctrine is established, that, at common law, the husband has a right to administer. And the provision in the statute which grants administration first to the wife or next of kin, means, in the case of the death of the wife, to the husband, &c.

The husband has a right, exclusive of all others, to be the administrator of his wife. Black. Com. Vol. 2, 504. Toller on Executors 84-85. Reeve's Dom. Relations 12. Stephens' *Nisi Prius* Vol. 2, 1871, and the following cases there cited. *Humphrey v. Bullen*, 1 Aik. 459. Sand's case Salk. 22. *Elliot v. Gun*, Phill. 19. *Watt v. Watt*, 3 Ves. 244.

3d. In this case, there being no creditors, and the whole estate consisting of *choses in action*, vesting in the husband at the decease of the wife, he is peculiarly the proper person to administer.

If this right is denied him, you compel him to pay out of his own pocket, for services in relation to his own property, which he is perfectly competent, and chooses to perform himself.

It is now well settled, and I doubt an authority can be found to the contrary, that the husband, who survives his wife, is entitled to all her *choses in action* whether reduced into his possession or not, in her life time. And most of the authorities go to the extent, that in case of the husband's death, after the wife, administration should be granted to the next of kin of the husband, and if obtained by a third person he is a trustee for the representative of the husband. Reeve's Dom. Relations, 12. Stephens' *Nisi Prius* Vol. 1, 745. Toller on Executors, 217 & 378. Co. Litt. 351. Kent's Com. Vol. 2, 114. Story on Bills 116. *Whitaker v. Whitaker*, 6 Johns. 111. *Richards v. Richards*, 2 Barn & Ad. 447.

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Peck & Colby for defendant.

The removal of Holmes for the cause stated was purely an act of *discretion* in the probate court, and there being no excess of authority this court will not re-examine a discretionary act of that court, on error.

It was so held in Orange County Supreme Court, March Term, 1854.

The decree is clearly within the statute, the administrator residing "out of the state."

2. The question of the husband's right to the *choses in action* of which the wife dies possessed, is not perhaps involved in this case. Under the statute of Car. 2d. he is allowed to administer as "next of kin;" but in this state he is not so entitled. He is not embraced in the terms "next of kin." 1 Ropers' Husband & Wife 326.

The opinion of the court was delivered by

REDFIELD, Ch. J. Until the revised statutes gave an appeal, in probate cases, to the county court, and only allowed exceptions upon questions of law, in such cases, to come into this court, all probate matters, resting in discretion, were subject to revision in this court, upon the same grounds they were to be originally decided, in the probate court. This is now the rule of decision of such questions, in the county court, which is but a higher court of probate, for determining appeals in such matters, as this court formerly was.

But, as the law now stands, this court have no general jurisdiction, in probate matters, to rehear and determine them, upon their merits, as under the former statutes. We sit merely as a court of error, in such cases, as much as in cases at common law. The removal of an administrator, for any cause, within the jurisdiction of the probate court, and which is, by law, a sufficient ground of removal, is, by the statute, and upon general principles, a matter of discretion merely, and as such, not revisable in this court, as was held in the county of Orange, two weeks since.

The argument addressed to us, had we the control of the whole case, might have much force, but cannot justify us in saying there was any error of law.

Judgment affirmed.

Hovey v. Niles.

SAMUEL H. HOVEY v. SAMUEL NILES.

Audita querela. Execution, when returnable, where the same is issued by a justice of peace.

An execution issued by a justice of the peace, for a sum exceeding \$53, by statute is required to be made returnable in 120 days, and if made returnable in 60 days, the execution will be held irregular and void.

In such cases, the writ of *audita querela* is the proper remedy to set aside the execution, and the right to sustain this suit, will not be affected by the fact, that the officer had not called upon the debtor, or made any effort to collect the execution, if the 60 days, from the date of the execution had not expired when the suit was commenced.

AUDITA QUERELA brought to set aside an execution, issued by Charles M. Seabury, a justice of the peace, in favor of the defendant against the plaintiff.

Plea, the general issue, and trial by the court.

It appeared on the trial, that on the 14th day of October, 1852, Niles, the defendant, recovered a judgment against Hovey, the plaintiff, for the sum of \$54,85, damages and for \$3,36, costs, before said justice, and on the 28th day of October, 1852, Niles prayed out an execution on said judgment, which was signed by said justice and made returnable in sixty days from that date, and on the same day said Niles gave the execution to one James Hamilton, a deputy sheriff, for collection.

That on the first day of November, 1842, justice Seabury wrote a line to Hamilton, directing him to get some one to alter said execution, so as to make it returnable in 120 days; but he neglected to do so, and the execution remained unaltered. That soon after the first day of December, 1852, said Hovey called on Hamilton to see the execution, and said he wished to ascertain the amount and settle it; he was shown the execution, and a few days after the present suit was brought. It did not appear that Hamilton had ever called on Hovey with the execution, or made any effort to collect it; that said Hamilton's term of office as deputy sheriff expired on the first of December, 1852, and while this execution was in his hands, and that the execution was in his hands at the commencement of this suit.

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The County Court, June Term, 1853,—POLAND, J., presiding,—upon these facts rendered judgment for the plaintiff to recover nominal damages, and that said execution be set aside.

Exceptions by defendant.

J. L. Edwards for defendant.

The equity of the case is with the defendant. *Audita querela* is in the nature of an equitable suit in which the equitable rights of the parties will be regarded. *Waddington v. Vanderburg*, 2 Johns. Cases 227. *Lovejoy v. Webber*, 10 Mass. 103. *Little v. Newburyport Bank*, 14 Mass. 448.

Being an equitable remedy it seems applicable rather to relief against a judgment improperly obtained, than to an execution irregularly issued. *United States v. Jenkins*, 18 Johns. 305.

The execution issued unadvisedly, and might be withdrawn before anything was done under it. *Cains v. Smith*, 8 Johns. 337; and was virtually withdrawn by the magistrate.

A clerical error, by which an execution varies in a small amount from the judgment, is no ground for quashing the execution. *Saunders v. Kentucky Ins. Co.* 4 Bibb 471.

The issuing of the execution, returnable in 60 days, instead of 120, was a mere clerical mistake of the magistrate, and not the wrongful act of the party, and cannot be corrected by *audita querela*, but may be on motion. *Smith v. Rix*, 9 Vt. 240.

The plaintiff has in no wise been injured by the execution, nor was he likely to be injured by the mistake. The magistrate had ordered the execution to be altered, and it was in the hands of the officer, whose term of office had expired, without any intention of enforcing its collection, at the time the plaintiff prayed out his writ.

At the time the plaintiff was informed that such an execution was in existence, it was in the hands of a third person, not then an officer; and we insist that the plaintiff under the circumstances was in no danger from it at the time he sued out his writ. It was a void piece of paper, and the plaintiff was not justified in suing out his writ of *audita querela*.

We can see no equity in the plaintiff's case, and we believe he ought not to be permitted to take advantage of his own wrongful act.

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S. Sumner and Cooper & Bartlett for plaintiff.

I. An execution for over \$53, running only sixty days, is clearly voidable by *audita querela*. *Tichout v. Cilley*, 3 Vt. 415.

II. This execution is no more valid than it would have been had it been made returnable in twenty or thirty days, instead of sixty days.

III. This question seems to be regarded as one not open to debate. *Bond v. Wilder*, 16 Vt. 393, and cases there cited.

The opinion of the court was delivered by

ISHAM, J. The judgment of the county court in this case must be affirmed. It appears from the exceptions that the judgment in favor of Niles, against Hovey, was rendered on the 14th of October, 1852, for a sum exceeding \$53,00, exclusive of costs. The execution was issued on the 28th day of October, in the same year, and made returnable in sixty days from date, and on the same day, was placed in the hands of a deputy sheriff for service and collection. This suit was commenced on the 7th of December, 1852, for the purpose of setting aside and vacating that execution. In cases of this character, the statute requires the execution to be made returnable, in 120 days, and if it otherwise issues, the execution is considered as irregular and void. This question has been frequently decided in this state. In the case of *Bond v. Wilder*, 16 Vt. 393, Ch. J. WILLIAMS remarked, "that an execution returnable in 60 days, instead of 120 days, is irregular, and void, and not authorized by any statute of this state:" and it was held, that a levy and sale of property on such execution, rendered the party a trespasser. He further observed that the question had been so often decided, that it would be improper for the court now to investigate the question at all. In such cases the writ of *audita querela* is a proper remedy to set aside the execution, and relieve the party from the danger of a seizure of his property, or an arrest of his person.

The right to sustain this suit is not affected by the fact, that the officer had not called upon the debtor for the execution, nor made any effort to collect it, as the 60 days from the date of the execution had not expired. Neither will the circumstance, that the magistrate had requested the execution to be altered, or that the term of office of the deputy sheriff had expired, have any such effect.

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The Comp. Stat. 99, sec. 80, provides that officers may perfect and perform the duties of such officers, upon all processes in their hands, at the time of the expiration of their office. So far as this execution is concerned, therefore, the power and duty of this officer remained the same as it was when he received the execution in his hands for collection; and so long as the execution was permitted to remain in his hands unaltered, during its life the debtor was subject to a seizure of his property, and the levy of this execution. To avoid which, he is entitled to a remedy by this process.

Judgment of the County Court affirmed.

WALTER HAUXHURST v. SAMUEL H. HOVEY.

Assumpsit. Interest. Depositions. Agent.

If the caption and certificate to a deposition are drawn together, by the commissioner taking the deposition, and he affixes his official signature to that statement, the deposition will be admissible, for the commissioner in such a case, as fully certifies to the truth of all the facts required, as if the caption and certificate were drawn separately and his signature affixed to each.

An agent, who receives money for his principal, in the transaction of the business of the principal, is not liable for interest on the money so received, before a demand is made for the money, unless the agent has received special instructions to remit the money as fast as collected, or is in default in neglecting to render his account.

The same rule applies to an attorney, who has collected money for his client.

ASSUMPSIT for money had and received.

Plea, non assumpsit, and trial by the court.

The plaintiff offered in evidence the deposition of one William F. Mott, Jr., to the admission of which the defendant objected, for alleged insufficiency of the caption and certificate. It appeared from the deposition, that the commissioner, taking the same, had written the caption and certificate together, and to that had affixed his seal and official signature, instead of writing them separately and signing each. The court overruled the objection, and allowed the deposition to be read in evidence.

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It appeared, that the defendant as agent of the plaintiff, had received certain sums of money for the plaintiff on the sale of certain lands of the plaintiff; that a part or the whole of the money was so received on or before January, 1850; and that on the 19th day of August, 1852, the said Mott, as the agent or attorney of the plaintiff, came to Troy, Vt. and then had a settlement and found due the plaintiff the sum of \$881,46, and on that occasion made out a statement, upon which the said balance appeared, and which the said Mott and defendant signed; and this bill or statement was annexed to the said deposition.

The county court rendered judgment for the plaintiff to recover \$881,46, and interest thereon since January 1st. 1850.

To the decision of the court allowing interest as above stated and to the admission of the said deposition the defendant excepted.

Cooper & Bartlett for defendant.

1. The deposition of William F. Mott, Jr., was improperly admitted by the county court.

The design of the commissioner was to take the deposition according to the Vermont form, but it is not in accordance with our form. It is not taken according to the provisions of the laws of Vermont, or New York, and of course not admissible. Comp. Stat. 274 § 11.

This court have decided that the forms of the caption and certificate are part of the law and must be observed. *Whitney v. Sears*, 16 Vt. 587.

The form provides for two signatures, and it will not do to dispense with either. *Shed v. Leslie*, 22 Vt. 498.

2. There is no evidence tending to prove, that plaintiff is entitled to interest at all, but the contrary appears, because the funds were received by the defendant as the agent of the plaintiff, and unless he used the funds, or agreed to pay interest, he would not be liable.

The allowance of interest must be founded upon the agreement of the party express or implied. *Evarts v. Nason's Estate*, 11 Vt. 122.

H. F. Prentiss for plaintiff.

1. The deposition of Mott was properly admitted. Though it

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does not strictly comply with the form required by statute, it does in substance. This differs from the case of *Shed v. Leslie*, 22 Vt. 498. There the certificate of the oath was not signed by the justice.

If the caption is insufficient according to our form, the deposition having been taken in New York, and the witness living there, the presumption is, that it is taken in conformity to the laws of that state. Comp. Stat. 274 § 11.

2. The court were correct in allowing interest on the \$881,46, from January 1, 1850.

The debt at that time was due, and was for money received by defendant, for plaintiff, and according to our law a party is entitled, after his debt is due, to interest. *Raymond v. Admr. of Isham*, 8 Vt. 258. *Porter et al. v. Munger*, 22 Vt. 191.

The opinion of the court was delivered by

ISHAM, J. The deposition of Mr. Mott was not inadmissible, for any objections taken to the signature of the commissioner. The certificate and caption of the deposition, are not in strict conformity to the form prescribed by statute, as that contemplates separate signatures by the commissioner; one to the *jurat* or certificate, and the other to the caption. In this case, the certificate and the caption were drawn together, and form a connected statement of facts. When the commissioner, however, affixed his official signature to that statement, he as fully certified to the truth of all the facts required in the certificate and caption, as if they had been separately drawn, and his signature had been placed to each. In this respect, the case is unlike that of *Shed v. Leslie*, 22 Vt. 498. The deposition in that case was rejected, as the certificate and caption were separately drawn, and required distinct and separate signatures of the magistrate, in order that the facts stated in each, should be certified by him. When the magistrate certified the facts stated in the caption, leaving the blank unfilled for the certificate, there was wanting, on the face of the deposition, evidence that the oath was administered by the magistrate to the deponent. For that reason the deposition was rejected. In this case no such difficulty exists. The fact that the proper oath was administered to the witness, and that those facts exist, which authorized the taking of the deposition, are as fully certified by the

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commissioner, and are made to appear with as much certainty, as if a separate and distinct caption and certificate had been drawn, and each had the signature of the commissioner. The objection, we think, was properly overruled.

We think, however, there was error in the allowance of interest on the plaintiff's account, previous to the 19th of August, 1852. Interest is allowed whenever a contract to that effect has been made by the parties either express or implied; or where it appears from the case, that the party is legally in default. In such case, compensation in damages, equal to the value of the money, which is the legal interest on the same, may be allowed. 1 Amer. Lead. Cas. 498, and cases referred to. *Evarts v. Nason's Estate*, 11 Vt. 122.

The money for which this suit is brought, was received by the defendant as agent for the plaintiff in the sale of certain lands. An agent, receiving money under such circumstances, is not liable for interest before a demand is made, unless he has received special instructions to remit the same as fast as collected, or is in default in neglecting to render an account. 1 Amer. Lead. Cas. 513. The same rule applies to an attorney, who has collected money for his client. There is nothing stated in the case, that places the defendant in default, in not paying over this money, until after the adjustment of the balance due, on the 19th of August, 1852. No demand appears to have been previously made for the money, or instructions given to remit the same; nor was there any refusal to render an account when requested. Under such circumstances interest ought not to have been allowed against him.

When that adjustment was made on the 19th of August, 1852, and a balance of \$881,46, was found due to the plaintiff, the defendant knew precisely what sum he was to pay, and that amount was due immediately. From that time he is properly chargeable with interest, so long as the principal remains unpaid. The result is, that the judgment of the county court must be reversed, and judgment rendered for the plaintiff, for the sum of \$881,46, and interest thereon from the 19th of August, 1852.

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ELIZA EGLESTON v. JOHN BATTLES.

Bastardy.

A bastard child, born out of the state, its mother, at the time having no domicile within the state, cannot be affiliated, or its maintenance charged upon the father under our statute. See *Graham v. Monsergh*, 22 Vt. 543.

But if the mother is, at the time of the birth of the child, *bona fide* an inhabitant of the state, and the birth of the child, by accident, or during a temporary absence, occurs out of the state, the mother may have her remedy under the statute, against the father.

And if there is evidence tending to show the residence of the mother to be in the state, at the time, though the birth of the child occurred out of the state, the evidence should be submitted to the jury on the question of residence.

THIS was a prosecution for bastardy.

The defendant filed a motion to dismiss the complaint, because he says, "That said child was born and begotten in Stanstead, Canada East, and that said complainant, at the time said child was begotten and born, had no residence in this state; and that the defendant never was a resident of this state."

The County Court,—POLAND, J., presiding,—overruled the motion. To which decision the defendant excepted.

At the December Term, 1853, the defendant pleaded *not guilty*, and the cause was tried by jury.

On the trial the evidence of the complainant tended to prove the following facts as to her residence: That complainant is a native of Ireland, and came to this state in the spring of 1848, and lived at service at various places in Derby and Salem, till the spring of 1850, when she went to work for a tailor in Derby, at the village of Derby Line, to learn the tailor's trade; she staid and worked for the said tailor nearly one year, that she then worked at her trade at different places, for a few days at each place, till May, 1851; that she then went to the house of one Mr. Lee, who lived in Stanstead, a few rods over the line.

That when she went to Mr. Lee's, it was for the purpose of sewing for a few days only, and for several weeks her trunk and clothing remained at the house of the tailor where she learned her trade in Derby; but in the course of the summer her trunk and clothing were all removed to Mr. Lee's, and she remained

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and worked there till July, 1852. That she then came over the line into Derby, and remained some three or four weeks, and then went to one Mrs. Perry's in Stanstead, for the purpose of lying in, as she could not procure a place in Derby; it appeared that she staid at Mrs. Perry's about three weeks, when she gave birth to the said bastard child, on the 31st day of August, 1852; that she then returned immediately to Derby, and has since resided in Derby with her child.

The complainant's evidence tended also to prove, that said child was begotten by the defendant about the first of December, 1851, at Mr. Lee's house, while complainant was living there. That the defendant lived in said Stanstead, and worked for and at Mr. Lee's during the season of 1851. The counsel for the complainant also introduced a certificate of the overseer of the poor of the town of Derby, giving notice that said overseer would control and prosecute said complaint, under the statute, for the benefit, and in behalf of the said town of Derby.

The defendant's counsel claimed that the prosecution could not be sustained, even if the jury were satisfied that defendant was the father of the complainant's child; and requested the court so to charge the jury.

But the court declined to charge the jury as requested; but did charge the jury, that if they found that the defendant was the father of the complainant's bastard child, then they would return a verdict of guilty.

The jury returned a verdict of guilty, and the court thereupon made an order of affiliation.

To the charge of the court, and to the refusal of the court to charge as requested, the defendant excepted.

J. L. Edwards and *W. M. Dickerman* for defendant.

It appears from the bill of exceptions that the bastard child was begotten and born in Canada.

That at the time the child was begotten the complainant's residence was in Canada, and it does not appear that her residence was changed previous to the birth of the child.

The plaintiff was temporarily in Derby, a few weeks, but all her things remained at Lee's in Canada, and were not removed to Derby, till after the birth of the child.

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The bill of exceptions does not show that she had taken up her residence in Derby, till after she left Mrs. Perry's, nor the purpose for which she was in Derby previous to her going to Mrs. Perry's.

The presumption is that her residence was where she kept her trunk and clothes, and will be taken to be so, in the absence of all proof to the contrary.

The plaintiff's residence being in Canada, at the time the child was begotten and born, the cause of action accrued out of the state, and the case falls within that of *Graham v. Monsergh*, 22 Vt. 543.

As is said in that case, "the proceeding is altogether a matter of internal police, and is in its very nature as exclusively local as is the administration of criminal justice." The cause of action then must occur within the jurisdiction of this court, in order that the plaintiff may recover. If the child is born out of the state, the court has no jurisdiction. *Tanner v. Allen*, Co. Litt. 25. 1 vol. U. S. Digest 403.

The child was begotten and born out of the state. This is the cause of action. And as is said in the 22 Vt., above cited, "The remedy is a peculiar one, and given and regulated exclusively by statute, and has no fair and reasonable application to causes of action accruing out of the state."

The plaintiff came into the state for the purpose of charging the defendant with the support of the child, and not with the *bona fide* intention of residing here; this is manifest from all the circumstances.

H. F. Prentiss and Peck & Colby for plaintiff.

I. This cause differs materially from the case of *Graham v. Monsergh*, 22 Vt. 543, and comes within the exceptions stated by the learned CHIEF JUSTICE in the last clause of the opinion in that case.

In that case the child was begotten and born out of the state, and neither party ever resided in the state, till the plaintiff came here temporarily for the purpose of making her complaint.

In this case, the plaintiff came here to reside in the spring of 1848, and remained here till May, 1851, living in the village of Derby Line, when she went a few rods north of the line, in the same village, to a Mr. Lee's, "for the purpose of sewing for a few

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days only," with the *animus revertendi*. She, however, remained there till July, 1852, when she returned into Vermont. During the time she was at Lee's the child was begotten. She remained here three or four weeks after her return in July, 1852, and failing to procure a place here where she could give birth to her child, she went to a Mrs. Perry's, in the same village, a few rods north of the line, "for the purpose of lying in," with the *animus revertendi*, which she put into practice immediately after the birth of the child, and with her child has resided here ever since.

None of these facts were true in the case cited. Under these circumstances it would seem that the cause of action *accrued here*, that the injury accrued to a citizen of this state, who was *temporarily* abroad only, at the begetting and birth of the child, and all the acts done are to be referred to the *place* of her domicil which was *only* in this state.

II. The expression "same county" in section 1 chap. 71, of the Comp. Stat., must refer to the domicil of the woman at the time of making complaint. The same words are used in section 3, 4 and 5, and if construed to refer to the *place*, or county in which the cause of action happened, then the trial would be strictly *local*, which has never been so held.

The opinion of the court was delivered by

REDFIELD, Ch. J. The case of *Graham v. Monsergh*, 22 Vt. 543, fully establishes the rule, that a bastard child, born out of the state, its mother, at the time, having no domicil within the state, cannot be affiliated, or its maintenance charged upon the father, under our statute. We could not probably render this more obvious by any present argument.

It is nevertheless true no doubt, that if the mother is, at the time of the birth, *bona fide* an inhabitant of the state, the birth of the child by accident, or during a temporary absence, occurring out of the state, will not deprive her of remedy, under the statute, against the father.

But the question of residence was not, in the present case, submitted to the jury. And the testimony, as detailed in the bill of exceptions, although not perhaps altogether conclusive, would seem to indicate certainly, that the plaintiff's residence was probably in Canada, at the time of the birth of the child.

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There would probably be no question, that her having lived at Lee's, from May, 1851, till July, 1852, and within a few weeks after she first went there, having removed all her effects to that place, that was her residence until July. She then went to Derby and remained "a short time, three or four weeks." But whether she removed her effects to Derby, or not, does not appear. And if she did, whether they remained behind her when she went again to Stanstead, where the child was born, at Mrs. Perry's is not stated.

If she never removed her effects into Derby, after her residence at Lee's, or if they were carried with her to Mrs. Perry's, it would seem very difficult to make out any residence in Derby, after she left Lee's, until after the birth of the child, except while she remained in Derby, unless a mere intention to go there to reside, as soon as she could find a place to live, constitutes a residence. And the case of *Jamaica v. Townshend*, 19 Vt. 267, seems to settle that question against the plaintiff. But the facts may be more fully developed on a future trial, and may make a case for the plaintiff, and the present testimony might have entitled her to go to the jury on the question of present residence at the birth of the child.

Judgment reversed, and case remanded.

THOMAS HYDE v. JESSE COOPER.

Officer. Party. Trespass. Trespass ab initio.

If an officer, in the discharge of his official duty, commits a trespass, and the party does not control the officer in any way, then the party cannot be implicated in the original wrong, and the expressing of an opinion, as to the act, under protest that he does not assume to direct or advise the officer, is not such an assent to the act, as to implicate the party.

But where the mistake is one of fact, and such, as makes the officer a trespasser and the party knowing all the facts consents to take the avails of a sale, or counsels the act, which creates the liability of the officer, (as a general rule,) he is implicated, to the same extent, as the officer.

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When the party does not direct or control the course of the officer, but requires him to proceed, at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser, by relation, the party is not affected by it even when he receives money which is the result of such irregularity, although he was aware of the course pursued by the officer.

In such a case, to implicate the party, there must be proof that he consented to the course of the officer, or that he subsequently adopted it.

TRESPASS for an ox. The action was originally brought before a justice of the peace, and came to the county court by appeal.

Plea, the general issue, and notice that the defendant would rely upon the following special matter, viz: That the ox in question was regularly attached on a writ in favor of the defendant, Cooper, against the plaintiff, Hyde; that judgment was rendered upon the same and execution issued thereon according to law, and that the avails of the said ox described in the plaintiff's declaration, were applied upon said execution. Trial by the jury.

On the trial, the plaintiff offered testimony tending to prove, that about the first of April, 1852, the defendant prayed out a writ in his favor against the present plaintiff, and placed the same in the hands of one John Guild, deputy sheriff, who served the same, by attaching the ox in question, and soon after notified the defendant, Cooper, that the expense of keeping the ox would be as much as he would sell for, if kept till he could be sold on execution.

That defendant then told said Guild to proceed and sell the ox on the writ, and referred Guild to the statute regulating the proceedings upon such sales.

That the plaintiff, Hyde, had gone to Massachusetts, previous to said attachment, and did not return till June after; but that his family remained at their usual residence during all this period. That said Guild left a notice at the house of the plaintiff, with the family of plaintiff, that application had been made to sell said ox on the writ, and this was the only notice given of such application.

That after giving this notice Guild applied to defendant, Cooper, to ascertain whether such notice was sufficient; and that defendant said he thought it was, and directed Guild to go and sell the ox; that thereupon, Guild advertised and sold the ox at public

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auction, and paid over the proceeds of the sale, it being the sum of \$1,50, to the defendant.

The plaintiff also offered testimony tending to prove, that after the sale of the said ox, a brother of the plaintiff made some inquiry of Guild relative to said sale, the price for which the ox was sold, the number of persons present at the sale, and found fault with Guild for selling the same when no more persons were present to bid; and that defendant, Cooper, was present at the time, and said the officer had done just right.

It also appeared, that the defendant knew that plaintiff was absent from the state, and of the manner of the notice at the time of the sale, and when he received the money, the avails of the said sale.

The defendant then offered in evidence the writ in his favor against the plaintiff, on which the said ox was attached, and the officers return of the attachment and sale of the ox thereon, the record of judgment thereon, and also the execution issued on said judgment.

The defendant also offered testimony tending to prove, that at the time Guild, the officer, applied to him, after having left said notice at the house of the plaintiff, to know whether such notice was sufficient, that defendant told said Guild, that he should give no direction whatever about it, that he must proceed according to law; and that after being pressed by Guild for his opinion, defendant said, his opinion was that the notice was good; and that he gave no directions and assumed no control over the proceedings of the sale, except to make the application to the officer to sell.

The court charged the jury, that the notice left at plaintiff's house by Guild was not a sufficient notice to the plaintiff under the statute, and that if the defendant directed Guild to sell under such a notice, and directed or controlled the proceedings, he would be liable to the plaintiff.

Judge POLAND also charged the jury, that if the defendant gave no direction, in relation to the proceedings, in the sale of the ox, and assumed no control over them, except to give his opinion to the officer that the notice was good, he will not be liable in this action for any irregularity in the proceedings of the officer; and there was no such evidence of any adoption or ratification of the proceedings of the officer by the defendant as would make him

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liable in the action, provided he had done nothing to make him liable previous.

The jury returned a verdict for the defendant.

The defendant excepted to so much of the charge as related to the sufficiency of the notice; but subsequently waived the exception.

The plaintiff excepted to the remainder of the charge of the court herein set forth.

J. H. Prentiss for plaintiff.

A subsequent assent, or adoption, or ratification, by one, of a trespass committed with a view to his benefit, makes him a trespasser, though the act was not done at his request, or by his command, and though it be for the abuse of an authority in law. 1 Swift's Digest 531. 2 Starkie Ev. 809. 1 Chit. Pl. 180-1.

This assent, or adoption, may be other than by express words of affirmance; it may be inferred from the acts of the person to be affected. 1 Amer. Lead. Cas. 572; or by an acceptance, or retainer, or demand by him, of the consideration of the act, or a benefit under it—*vide* 1 Amer. Lead. Cases 573, and cases there cited; and the ratification of a part of a transaction by claiming or accepting a benefit under it is a ratification of the whole. *Newell v. Hurlbert*, 2 Vt. 351. *Whitwell et al. v. Warner et al.*, 20 Vt. 425. *Bryant v. Moor*, 26 Maine 84-87, cited in 1 Amer. Lead. Cas. 574.

Assent may also be presumed from acquiescence after notice, and if the principal is informed by the agent of what has been done, the principal must express his dissatisfaction in a reasonable time else his adoption of the act will be presumed. 1 Amer. Lead. Cas. 573. *Cairnes v. Bleeker*, 12 Johns. 300.

In the present case, after the notice had been left at the plaintiff's house, the defendant was informed by his officer, Guild, of the manner of the notice, and was asked if the notice was sufficient, and replied, that he thought it was. The defendant was the creditor, a practicing lawyer, whose learning he would deem it an insult to dispute, and to him Guild resorted for instruction and orders.

After the sale, with a knowledge in the defendant of all that Guild had done, and the manner of his doing it, and that knowl-

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edge communicated by Guild himself, the defendant said to him that he had done just right. Was this an expression of dissatisfaction? Was it not a direct approval? And was it not so much so at least, that it should have been left to the jury to determine its import?

At a later period the defendant accepts from the hands of Guild the money realized on the sale of the ox, knowing all the circumstances under which it is derived, and without dissent or disavowal of any sort applies it on his judgment against the plaintiff.

If "actions speak louder than words," this was more than equivalent to saying, "Well done, good and faithful servant."

Cooper & Bartlett for defendant.

The jury, in this case, found that the defendant did not control the process in the officer's hands in any way before the sale of the ox, and the only question to be considered is, whether his subsequent acts were sufficient to ratify and confirm the trespass committed by the officer, so as to make defendant liable for said trespass.

If a trespass was committed by the sheriff, it was done while he was proceeding, as he supposed, legally under color of process to collect defendant's debt. The defendant did not control him, or in any way ratify, confirm, or even assent to a trespass after it had been committed. The money paid to defendant by the sheriff, he received, "as having been legally collected to apply on his debt."

What defendant said, to the officer in the presence of plaintiff's brother, could not amount to a ratification of any wrong done by the sheriff. The officer had told plaintiff's brother and the defendant the number present at the sale of the ox, and what said ox sold for, and the plaintiff's brother thought the officer ought not to have sold the ox when no more were present to bid; and the defendant saying, "that the officer did right," if it amounted to a ratification of any thing could certainly ratify nothing that was not embraced in the said conversation, and the plaintiff does not claim but what the sale was legal, if the notice was sufficient.

The notice was not mentioned in the said conversation, and nothing was there said by the defendant, which could in any way relate to it.

If receiving money collected, by an officer, for him, or if by

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telling an officer, he has done right when he pays him money, a man makes himself liable for the wrong acts of the officer while proceeding with his precept, he would never be safe in taking money from an officer, or in making the slightest remark to him, lest he should make himself liable for his misconduct. The charge of the court, in this case, was clearly correct.

The opinion of the court was delivered by

REDFIELD, Ch. J. The only question reserved by plaintiff's exceptions, (defendant's being waived,) is whether the decision of the court, in regard to defendant's conduct making him a trespasser *ab initio*, was correct. According to the recent English cases, upon this subject, to implicate one, as a trespasser *ab initio*, he must do, or consent to some act, which goes to show, that the original taking was with the purpose of putting the thing to an illegal use. These decisions go upon the avowed ground of narrowing, to the utmost, the extension of this doctrine, of making officers, and others, trespassers by means of some technical irregularity, in the detail of their duties. The professed object is a commendable one no doubt, and has been to a considerable extent adopted, by this court, in a late case in Grand Isle Co., *Stoughton v. Mott*, 25 Vt. 668.

Applying that rule to the present case, it would not be easy to make even the officer a trespasser *ab initio*. It is in fact somewhat questionable, I think, whether there was any fatal irregularity in the sale. But as the exceptions are waived, on the part of the defendant, the plaintiff is probably fairly entitled to have it here considered, that the officer's notice was insufficient, and the sale being the same, as if made without any notice, might probably come even within the English rule of making the officer a trespasser.

But the jury having found that the defendant did not control the officer, he cannot be implicated, in the original wrong. And the expressing of an opinion under protest, as in the present case, it has often been held will not preclude the party, from recovering damages of the sheriff, for the very act, which it would, if he were thereby to be considered, as consenting to the act.

The only remaining question is in regard to defendant's subsequent ratification of the act. What defendant said in regard to

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the officer having done right, was said, when the party was objecting, to the sale being made, when but few bidders were present, and could not fairly be referred to the notice given. And defendant receiving the money has never been held, to imply any consent to any irregularity in the proceedings of the officer, even if known to the party, especially when such irregularity consisted, in some technicality, of which the party is supposed ordinarily not competent to judge. And in the present case the defendant is to be viewed like any other party, not subject to any severer rule of judgment, on account of his supposed knowledge of the law, inasmuch as he disclaimed any purpose of assuming the responsibility of controlling the officer. His receiving the money would not seem to imply any assent to the officer's proceeding beyond what had transpired before the sale.

No doubt, if the officer takes the property of one man, upon another's debt, or sells, at private sale, and the creditor accepts the money, knowing the facts, he may be liable for the acts of the officer. But in such case the acts are not regarded, as official. But it would scarcely be consistent, with sound reason, to apply the same rule to all the acts of an officer. It would be almost equivalent to exonerating the officer, from all official responsibility.

The views here expressed are strongly confirmed, by the decision in the case of *Abbott v. Kimball*, 19 Vt. 551. As a general rule perhaps, where the mistake is one of fact, and such as makes the officer a trespasser, and the party knowing all the facts, consents to take the avails of a sale, or where he counsels the very act, which creates the liability of the officer, he is implicated, to the same extent, as the officer. But when the party does not direct, or control the course of the officer, but requires him to proceed, at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser even, by relation, the party is not affected by it, even when he receives money, which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable, unless he consents to the officer's course, or subsequently adopts it. And if he does that, he cannot maintain an action against the officer, for doing the act, and the consequence would be, that if receiving the avails of a sale on execution were to be regarded, in all cases, as amounting to a ratification of the conduct of the officer, in the sale, it

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must preclude the creditor from all suit, against the officer, on that account, which has never been so regarded. The party may always take money, which the officer informs him he has legally collected without assuming the responsibility of indorsing the perfect legality of the entire detail of the officer's official conduct, in the matter.

For if the officer is compelled to refund to the debtor, on account of his irregularity of procedure, that will not affect the right of the creditor to retain the money. He is still entitled to retain the money, against the officer. And the party cannot claim the money of the creditor, without thereby affirming the sale. So that the creditor's accepting the amount of money, for which the property sold, is no more a ratification of the conduct of the officer, than if he took the money of the officer, on any other liability. The money is the officers, whether he was a trespasser or not, and he is at all events liable to the creditor. If the sale was irregular, that is his loss, he must still pay the creditor, and accepting the money is but taking pay for the officer's liability to the creditor, for his default in the sale, if it was irregular. So that in any view of the case, there is no ground of implicating the defendant.

Judgment affirmed.

PORTUS BAXTER v. OTIS THOMPSON.*Action of Account.*

In the action of account, matter, which shows that defendant is under no obligation to account, cannot be pleaded before the auditor; if defendant would avail himself of such an objection, he must plead it specially in bar of the action, before judgment to account is rendered.

Where the accounting grew out of a contract made by the parties in 1845, in relation to growing hops, the auditors in adjusting the accounts of the parties, would be confined to the dealings growing out of the contract.

And where by the terms of the contract, the hops raised or their proceeds, when prepared for market, were to be equally divided between the parties, and the defendant took the plaintiff's share to market without his knowledge or consent,

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—*Held*—that defendant could not charge plaintiff with the freight and commission for selling said hops, as the obvious meaning of the contract is, that if a sale was made by their mutual consent, the avails were to be divided equally; but if not sold in that manner the hops were to be divided, and each party receive their proportion.

ACTION OF ACCOUNT. Judgment to account was rendered in the county court, and auditors were appointed, who reported in substance as follows :

That plaintiff's action was founded upon a written contract, of which the following is a copy : " Otis Thompson will set out one acre of hops, in the rear of N. West's, for Portus Baxter, he will take all necessary care of them, and prepare them for market. Portus Baxter is to furnish poles, and put on the ground all necessary manure, and put it on the hills or ground and cover it with sufficient dirt; said Baxter is to prepare two cords of four foot wood cut and put into the hop house on his premises, and furnish one half of the sacking. The hops when prepared for market or their proceeds, are to be equally divided between them, said Baxter & Thompson, and the contract to remain in force for six crops of hops.

(Signed,)

OTIS THOMPSON,
PORTUS BAXTER."

Derby, April 30, 1845.

That the matter of accounting was confined to the proceeds of the hop yard, for the year 1849, so far as the above contract came in question. The plaintiff presented the following account :

Otis Thompson,

To Portus Baxter,

Dr.

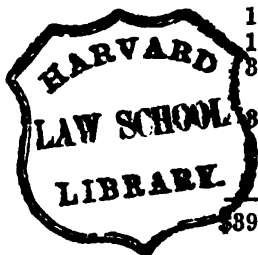
1849, To 750 lbs. of hops, being my share of the hops raised in yard back of church this year, belonging to the ——— at 16 cts. per lb.,	\$120.00
1848, April, 2 tons of hay,	12.00
1846, To cash paid you on Quebec contract,	12.50
Interest,	5.25
	<hr/>
	\$149.75

That the whole crop of hops for the year 1849, was 1022 pounds, and plaintiff's share was 511 pounds, which the auditors allowed to the plaintiff at 16 cents per pound, in all \$81.76,

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and interest on the same, \$20,43; they also allowed the plaintiff for one and three fourths tons of hay, \$8,75, and interest on same \$2,96. They thus allowed plaintiff on his account \$113,90, and the other item in the plaintiff's account, the same being objected to, the auditors disallowed, as having no connection with the contract between the parties in relation to the hops raised in 1849; but growing out of a certain other contract originally entered into by the defendant and a party in Quebec, but which the plaintiff became interested in, by an arrangement with the defendant. The defendant presented an account in offset amounting to \$96,52. The following items of which, the auditors allowed.

1 Trowel to lay brick,	\$1,00
Freight of 4 bales of hops to the line,	34
2 Cords of wood in 1849,	3,50
2 " " " in 1850,	3,50
Carrying manure to vine yard,	1,25
Sharpening hop poles,	2,50
1 Birch tree for hop press,	1,00
1 Bush scythe,	1,50
2 Cords of wood in 1851,	3,50
1 pound of twine,	50
17 1-2 yards bagging,	3,50
Note and interest,	,82
Interest to date,	,89
	<hr/> \$39,30



The following charges the auditors disallowed subject to the opinion of the court.

To going to Quebec and expenses,	\$16,50
Paid for trucking hops in Boston,	25
Paid for getting them inspected,	1,00
Paid for inspecting 511 pounds of hops,	51
Paid freight on same from Derby to Boston,	5,11
Paid for storage of hops in Boston,	58
Freight and truckage to Albany,	3,50
Paid freight to Western depot,	50
Commission for selling hops, 511 lbs.,	4,50
Discount on \$71,54,	7,16
5 hop sacks to use in yard \$6,50, and use of team to draw hops,	21,50
	<hr/> \$61,18

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The auditors found, that the defendant took the said hops to market without the knowledge or consent of the plaintiff, and allowed the plaintiff, to balance accounts the sum of \$73,60.

The County Court, December Term, 1853,—POLAND, J., presiding,—accepted the report and rendered judgment thereon, for plaintiff to recover the amount found due by the auditors.

Exceptions by defendant.

Cooper & Bartlett for defendant.

H. F. Prentiss for plaintiff.

The opinion of the court was delivered by

ISHAM, J. Whether a demand in this case, was necessary before the commencement of this action; and if so, whether in this instance, the demand was sufficient, are questions which do not properly arise on this report. No matter can be pleaded before the auditors, which shows that the defendant is under no obligations to account in this action. It should have been specially pleaded in bar of the action, before judgment to account was rendered. That objection, if it exists, must be treated as waived by not pleading the matter in bar, before the rendition of that judgment. 1 Steph. N. P. 3. Com. Dig. accompt F. 11.

The plaintiff has filed no exceptions to the acceptance of this report. The balance due the plaintiff as allowed in the items of charge, is \$74,60, but by some mistake was carried out at the sum of \$73,60, on which the judgment was rendered. This matter, however, cannot now be corrected, unless the judgment is reversed for some cause, for which exceptions were taken by the defendant; in which event, the accounts on both sides would be opened, and it would then be the duty of this court to render such a judgment as should have been rendered by the county court.

In relation to the plaintiff's account, we perceive no error for which this judgment should be reversed. No sum has been allowed against the defendant, for which he has reason to complain. The charge for \$12,50, for money paid on the contract of December 14, 1846, for the sale of hops in the city of Quebec, was properly not included in the balance as allowed by the auditors. The charge constituted no part of their dealings, arising out of the con-

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tract of April 30th, 1845. The auditors have found that the contract on which this money was paid, was put an end to by the defendant, and that the plaintiff has lost the benefit of this contract by that act. Whether the plaintiff can recover back that money and if so, whether the whole, or a proportional part, we are not called upon now to decide; as it is a matter for which assumpsit is the more appropriate form of action, and which as it is objected to, cannot be investigated in this action of account. There are other items of charge in the plaintiff's, as well as the defendant's account, which probably were subject to the same objections, but which were allowed without objection at the time, and for which no exceptions were taken. We refer to the charge for hay in the plaintiff's account, and to the charge for a note and interest thereon, in that of the defendant. But as no objections were taken, or exceptions allowed for that matter, it is no cause for reversing the judgment.

The more important questions in the case, arise from the disallowance of a portion of the defendant's account. The charge of \$16,50, for going to Quebec and expenses, were properly disallowed, for the same reason that the \$12,50 were disallowed in the plaintiff's account. The charges from the 4th to the 16th inclusive, amounting to the sum of \$15,95, we think, under the circumstances of the case, were properly disallowed. They all depend upon the same question, whether the defendant was justified in taking and transporting to market and selling Mr. Baxter's share of the hops, raised during the year 1849. It is to be observed, that this is not a case of consignment of hops to be sold on commission; nor is it the case, where joint owners of property have requested one of their number to dispose of the property with an understanding express or implied that compensation was to be paid for such services; on the contrary, the auditors expressly find, that the hops belonging to Mr. Baxter, were taken by the defendant, with a large quantity of his own, and transported to Boston, Albany, and Philadelphia, for sale, without the knowledge of, or consultation with Mr. Baxter, for which these charges for freight, inspection, and commission, &c. are made. By reference to the contract, we find that the hops or their proceeds, when prepared for market, were to be equally divided between them. The understanding of the parties in that contract is quite obvious. If

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a sale was made by their mutual consent, the avails were to be equally divided; but if not sold in that manner, the hops were to be divided, so that each of the parties could receive their proportion, and thereby be enabled to make such a disposition of their respective shares, as they saw fit. Neither of these parties intended to give the other the right of transporting his share of this property to a distant market, and subjecting himself to such expenses, without his knowledge or consent. There was no express stipulation to that effect, and none is to be implied from the mere relation of joint ownership. It may have been for the interest of one to sell, and of the other to retain his proportion for present or future use. These principles were fully recognized by Chancellor KENT, in the case of *Franklin v. Roberson*, 1 Johns. Ch. 157, and of *Bradford v. Kinsbuly*, 3 Johns. Ch. 483. *Thornton v. Preston*, 1 Aust. 94.

The same, and still greater objections, exist in relation to the charge of \$7,16, being the discount at the rate of 10 per cent., on the sale of a note given for the hops. If a special authority had been given to sell, it would not have authorized a sale on credit, but only for ready money. 1 Amer. Lead. Cases 680. The defendant had no right to sell and take the note and dispose of it at such discount, and charge the owner of the goods with the amount; *a fortiori*, such right does not exist in a case like the present, where the party had no authority or power to sell even for ready money. Paley on Agency 26-173. The other items in the defendant's account depended upon mere questions of fact, and on which the finding of the auditor is conclusive. The objections to the deposition have not been insisted upon, at this hearing of the case. The result is, that the judgment of the County Court is affirmed.

Merriam, Admr. v. Hemmenway et al.

LUTHER MERRIAM, ADMR. *de bonis non* OF S. K. DEXTER,
testate v. S. S. HEMMENWAY, JOHN P. SARTLE, & GEORGE
 C. PECK.

[IN CHANCERY.]

Probate Court. Jurisdiction, &c.

Where D. by his will made his wife executrix, and also named her trustee of certain property, consisting of notes, and she administered in part upon D's estate, and was appointed trustee by the probate court and gave bonds; and soon after she deceased, and S. & P. were appointed administrators of her estate; and the plaintiff was appointed administrator *de bonis non* of the estate of D.; the notes having become due, being in the hands of S. & P. who claimed to hold them as administrators; and the plaintiff claiming to have and collect them, as administrator *de bonis non* of D. and for the purpose of obtaining and collecting the same brought his bill in chancery—*Held*—That the probate court has jurisdiction of the matter, and the accounting cannot be taken out of that court into the court of chancery. *Held* also, that S. & P. have the rightful possession of the securities, and that it is their duty to settle the trustee account of the intestate in the probate court, and to collect and manage the trust fund, until they can settle the account, and that the plaintiff has no legal control over the same.

THIS is a bill of foreclosure, claiming three notes, specified in a certain mortgage, to be due to plaintiff's testator, but in the hands of defendant, Sartle.

The notes and mortgage are dated, May 31, 1847, one for \$200, in one year, and two for \$300 each, in three years, all of which were admitted by Hemmenway, to be due, except what is indorsed thereon, being the \$143, on the \$200 note, and \$36 on each of the \$300 notes paid to Nancy P. Dexter, and \$40,50, paid to defendant, Sartle, as interest. This being the only evidence in the case of the existence of the notes, or of their being due, must be taken to be true, or the plaintiff fails in his proof on the chief issue. This would leave some \$700, or more due upon the notes.

Stephen K. Dexter's will is proved the 22d day of December, 1847, and Nancy P. Dexter appointed executrix.

The will gives her \$100 in money, and "all the money which remains due to me in notes, in Barton, or elsewhere, and also all the money or other property, which I have not otherwise disposed of in this will, which is on hand or due to me, I leave for the support of my beloved wife, N. P. D., in addition to what I have

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heretofore given her in this will. She is to have the whole control and management of the same, and use it in any suitable manner, for her support, and if she causes any interest or income to arise from it, *that shall be hers forever*, and if when she ceases to be my widow, any part of the principal money or property is left unexpended, it is to be divided equally among my children," &c.

Mrs. Merriam is given \$300, and Mrs. Heath \$200, out of the Hemmenway notes—when they became due, without interest. They are expressed also, to be paid out of the notes due in about three years, showing that reference is had to the \$300 notes. The will appoints Nancy P. Dexter, "*trustee*," "to settle my business, and manage the same, and do any business required of her to do." She inventoried all these notes as belonging to S. K. D.'s estate. On the 10th day of January, 1849, Nancy P. Dexter rendered her account to the probate court, and was therein charged with all these notes, and credited with her own legacy, \$100, payment of debts, expenses of administration, &c., leaving a balance in her hands of \$1,052.58, and is appointed "trustee" of this property, under the will, for Mrs. Merriam and Mrs. Heath, and one other, all being children of the testator and joint residuary legatees, who in the appointment of Mrs. Dexter, as trustee, are expressly named by the probate court, as *cestui que trusts*, and she gave bonds, as trustee.

Soon after this Mrs. Dexter dies, and Sartle & Peck are appointed her administrators, and the plaintiff also, on the estate of S. K. Dexter. These notes have since become due, being in the hands of defendants, Sartle & Peck, who claim to hold and collect them, as belonging to the estate of Nancy P. Dexter, and plaintiff claims to have and collect them, as belonging to the estate of Stephen K. Dexter; and if the estate of Nancy P. D. have any further interest in them which is denied, it is said her representatives must come to the plaintiff, and not compel him to go to them.

Chancellor COLLAMER dismissed the bill, from which decree the plaintiff appealed.

S. A. Willard and J. H. Kimball for orator.

T. P. Redfield and J. P. Sartle for defendants.

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The opinion of the court was delivered by

REDFIELD, Ch. J. Two general questions arise in this case. Who are the persons really interested in this fund? and how are their rights to be adjusted, and in what court?

I. In regard to the right of property in these notes at the decease of Nancy P. Dexter, the legacies charged upon them, not having then become due, it must clearly be regarded as in Nancy P. Dexter; 1st, in her own right, to the extent of the accruing interest, till due. 2. For the purposes of support, she must be regarded, as holding the balance of principal in her own right, i. e. all above the \$500 legacies. And this interest, in all reason and decency, must include expenses of last sickness and burial, and settlement of estate, for the expense of burial is reckoned as part of the expense of settlement of one's estate. And if none of these expenses are to be reckoned, we should give a very forced and unreasonable construction to the will, and one sadly at variance with its general tenor in regard to Nancy P. Dexter. For the testator seems to have been thoughtful and tender of her.

As to the \$500, Nancy P. Dexter might hold it as executrix, under the will, or as trustee. But, as the will names her as trustee, and as she was formally appointed as such by the probate court, by a decree, not appealed from, and which seems fairly to constitute a consummation of the account, and gave bonds accordingly, it seems to us but reasonable to treat her, as holding the balance of the principal, as trustee for these legatees. But whether she held it as trustee or executrix, it certainly was properly under her control, up to the time of her death, and came rightfully into the hands of her administrators, and was properly retained by them, until they could close the settlement of her estate, inasmuch as they might find it necessary to use all of the fund, except what belonged to the specific legatees. And it was more proper, under the circumstances, that they should receive the pay on the notes, and hold the \$500 in trust for the specific legatees, than that they should at once, be deprived of the property, and then look to the plaintiff for what belongs to them. Nancy P. Dexter seems, by the will, to have had the primary right, and the entire control and management of the fund, during her life, with this qualification, that after the legacies charged upon them became due, she was to see it paid, doubtless. But this she would

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do, rather as trustee, than executrix, and as to all the rest, she held it in her own right, and for her own benefit, as is held in McKrorky's Appeal, Law Register, April 1853, p. 342.

After the decease of Nancy P. Dexter, it was the duty of her administrators to settle her account, as trustee, in the probate court, and this could not be done, until her own estate was settled. And had her right ceased by marriage, or removal by order of the probate court, the plaintiff could not have pursued her in any other court than the probate court. A common law action of account will not lie in such case, as was expressly held by this court in *Curtis v. Curtis*, 13 Vt. 517. And we see no better ground for taking the matter of accounting out of the probate court, into the court of chancery. And to settle the matter by fractions, in the manner attempted in this case, is still more objectionable. The proper place to have these matters all adjusted, is undoubtedly the probate court. If any suggestion of waste or want of responsibility, in the trustee, or her bail, were made, a court of chancery would no doubt come in aid of the probate court, and thus enable the plaintiff to preserve the trust fund, but in that case the probate court would still retain the principal jurisdiction of settling the account of the trustee. And the only mode in which the defendants, Sattle & Peck, can save the trustee's bond is, to settle her account as such, in the probate court, and pay over the trust fund to those entitled to receive it. And it is not certain that the plaintiff is entitled to any of this fund, and if so, to what amount. This must be determined in the probate court.

The lien of N. P. Dexter's estate is an entire one, upon all the property of Stephen K. Dexter, in her hands, and for this purpose she may collect, invest, and manage, at her own discretion, according to the will, during her life or widowhood. And the administrators of the trustee must of necessity, do the same, until they can settle her account in the probate court, in the shortest reasonable time.

The defendants, Sattle & Peck, having then the rightful possession of the securities, and an entire lien upon them, to some extent, it is not for the administrator, *de bonis non*, of Stephen K. Dexter to demand this security, or any other, in particular. The defendants have the rightful control of them all, as against the estate of Stephen K. Dexter, until their lien is ascertained and

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satisfied, and the balance belongs to either Stephen K. Dexter's estate, or the legatees under his will, and the probate court are in the first instance, to determine this, also how and to whom the ultimate balance shall be paid, and any one interested may appeal if dissatisfied. This is the natural, expeditious and simple course of the law in this matter, and is altogether consistent with the opinion of the late Ch. J. of this court, in *Merriam, Admr. v. Brown et al.* [Read at the hearing from manuscript.]

The only possible embarrassment attending this course is, that the securities are still nominally payable to Stephen K. Dexter's estate, and if sued at law, must probably be sued in the plaintiff's name. This may have led the plaintiff into the mistaken apprehension, that he had the legal control of the securities. But it is not uncommon for the equitable interest in debts, to be in one, and the legal interest, in another. In such case, the one beneficially interested may collect without suit, may foreclose in equity, in his own name, or may compel the one holding the legal interest to suffer a suit to be brought in his name, for the benefit of the one beneficially interested.

Decree affirmed.

 GEORGE ATKINSON v. WILLIAM BROOKS.

Rights of an indorsee of negotiable paper indorsed to him as collateral security for a pre-existing debt.

The indorsee of a bill of exchange as collateral security for a pre-existing debt is, *prima facie*, a holder for value, and so entitled to recover against an accommodation acceptor, not known to him to be such when the bill was taken by him.

ASSUMPSIT upon a bill of exchange.

Plea, *non assumpsit*, and trial by jury.

On the trial, the plaintiff read in evidence the bill declared on, of which the following is a copy, viz :

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"Dolls. \$1574.97.

Bradford, July 25, 1851.

"Three months after date, I pay to the order of myself, at
"Bank in Boston, Fifteen hundred and seventy-four dollars ninety-
"seven cents, value received, and charge the same to account of
"your obt. servant." (Signed,) "Asa Low."

"To William Brooks, Esq., }
"Sherbrook, C. E." }

The defendant admitted the signature of the drawer, acceptor and indorser, but objected to its being received in evidence on account of a variance; the court overruled the objection; to which the defendant excepted.

The said bill was accepted by the defendant, and indorsed in blank by the said Asa Low.

It was admitted, that the plaintiff was the cashier of the State Bank, in Boston, and that this suit was brought in his name for collection merely, for the firm of George Lawton & Co., of said Boston, who are the plaintiffs in interest in the suit. That the bill was left by said Lawton & Co. in said bank for collection, and was duly protested, for non payment.

The plaintiff offered testimony tending to prove, that said bill was passed, and delivered by said Low, in September, 1851, to the firm of Joshua Norton, Jr. & Co., a firm of merchants in Boston; that said Low was indebted to said firm of Norton & Co., and that said Norton & Co. received the said bill to be applied in part extinguishment of Low's indebtedness; that about the 12th or 13th of October, 1851, the said firm of Norton & Co. transferred and delivered the said bill, to said Lawton & Co., in payment for a note of about \$1,100, held by Lawton & Co. against said Norton & Co., which was then due, and had been protested for non payment; that said note was not given up at the time, for the reason that the same was in the Bank at Brighton, but that the same was considered as paid; and that Lawton & Co. executed some obligation, or receipt to Norton & Co. to account to them for the balance of said bill when collected of the acceptor, or drawer.

The plaintiff's evidence also tended to prove, that said Lawton & Co. received said bill *bona fide*, and without notice of any defect in the title of Norton & Co. to said bill.

The defendant then offered evidence tending to prove, that after

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said bill had been accepted by him, and after the same had passed out of the hands of said Asa Low, the letter "I" between the words date and pay, in said bill was not there when accepted by him, or indorsed by said Low, but had been inserted since, without the knowledge or consent of defendant or said Low.

The defendant also offered testimony tending to prove, that said bill was not passed, or delivered by said Low, to Norton & Co., to be applied on his account, or upon any dealings between them; but that the same was left by said Low with said Norton & Co. for the purpose of raising money upon it in the market for said Low, and that said Norton & Co., at the time of receiving said bill of said Low, agreed to obtain the money upon it, and send it to him at Bradford, Vt., or return the bill to him in a few days.

The defendant's evidence tended also to prove, that when said Lawton & Co. received said bill of said Norton & Co., the same was not received in payment or extinguishment of their note against Norton & Co.; but was received by them merely as *collateral security* to be applied in payment of said note if collected; but that the said Lawton & Co. retained their note as a subsisting security against said Norton & Co.

The court,—POLAND, J., presiding,—charged the jury, that the alleged alteration of said bill by the insertion of the letter "I" was not an alteration that changed the legal effect of the instrument, and would not release the parties to it, from their liability thereon if done without their consent. To this part of the charge defendant excepted.

The court also, (among other things not excepted to,) charged the jury that, if they found that Norton & Co., received said bill of Low, in the manner and for the purposes claimed by the defendant only, and so that Norton & Co. had no right to recover upon it, still if they found that Lawton & Co. took it in good faith while current, and without any notice of any defect in the title of Norton & Co., in payment and satisfaction of their note against Norton & Co., and with an agreement to pay the balance to Norton & Co., then plaintiff would be entitled to recover to the amount of their note given up, but not the full amount of the bill. The jury were also charged, that if they found that Lawton & Co. received said bill of Norton & Co. as *collateral security* for the payment of their note merely, and that Lawton & Co. still continued

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to hold said note as a subsisting and valid debt against Norton & Co., then Lawton & Co. acquired no better title to the bill, nor any better title to recover than Norton & Co.

To the charge of the court as above detailed, the plaintiff excepted.

The following amendment to the exceptions, was allowed subsequent to the filing of the same, viz: That it was also proved by the plaintiff, that at the time Lawton & Co. received said bill of Norton & Co., in October, 1851, Norton & Co. owed Lawton & Co. two other notes, one for \$2,428, which fell due in January, 1850, and one for \$1,234.83, which fell due the March following, and that said notes are still unpaid.

It also appeared, that Norton & Co. failed in January, 1852, and soon after went into insolvency under the laws of Massachusetts, and that no dividend has yet been paid on their debts.

The jury returned a verdict for defendant. The plaintiff filed a motion to set aside the verdict for the reason, that a juryman had disclosed the verdict after it was sealed up and before it was delivered in court. The motion was overruled by the court.

J. H. & H. F. Prentiss for plaintiff.

1. The insertion of the letter I was not a *material* alteration of the bill, and therefore in no way changes its legal effect, or the liability of the parties.

2. The most recent and best authorities in England and in this country establish the doctrine, that a *bona fide* holder, taking a negotiable instrument in payment of, or as *security for*, a pre-existing debt, is a holder for a valuable consideration, and entitled to protection against all the equities between the antecedent parties. *Swift v. Tryon*, 1 Amer. Lead. Cas. 382, and cases there cited. *Chickopee Bank v. Chapin*, 8 Metcalf 40. *Blanchard et al., v. Stevens*, 3 Cush. 162, and cases there cited. Story on Promissory Notes 215.

The forbearance of Lawton & Co. to collect the note against Norton & Co., is as good a consideration for the draft as though it had been received in *payment* of the note.

What difference should it make with the defendant whether the bill was passed in *payment* or as *security* for the debt?

By accepting the bill he acknowledged funds of the drawer in

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his hands equal to the amount of the acceptance, and it is *immaterial who* collects the draft, whether he be a *bona fide* holder or not. The drawer indorsed the bill and put it in circulation and it is a matter between him and his indorsee what use was made of the bill. There, is where the accountability rests; and if the drawer has trusted his paper in "villainous hands," it is his own fault, and we, who have taken it in good faith, should not be sufferers thereby. A man, who throws his paper into market, does it at his own risk. He makes it negotiable, and puts it in circulation, and he must take the chances of trade. His mistake should not be visited upon the head of an innocent holder.

The cases of *Sawyer v. Cutting et al.*, 23 Vt. 486, and *Keyes & wife v. Wood et al.*, 21 Vt. 331, though not strictly analogous to this case, are authorities in favor of the plaintiff.

3. Plaintiff is entitled to recover the full amount of the draft. The case shows, that at the time Lawton & Co. received the draft, Norton & Co. were, and still are largely indebted to them on other notes besides the \$1,100, note. And at the time they received the draft, they executed to Norton & Co. an accountable receipt for the balance of said draft over and above the \$1,100, note, which balance Lawton & Co. had a right to understand should be applied on their other notes against Norton & Co., and it should be so treated. *Bosanquet v. Dadman*, 1 Starkie R. 1. 8 Ves. 531. 4 Bing. 496. 1 Bing. New Cases 469. *Percival v. Frampton*, 2 Crompt. Mees. & Ras. 180. *Sawyer v. Cutting et al.*, 23 Vt. 486.

4. As to the motion to set aside the verdict and for a new trial, the counsel cited, *Warner v. Carpenter*, 1 Tyler 250, *Suffolk Bank v. Austin et al.*, Windsor County Court, November Term, 1838, COLLAMER, J., presiding; and *Forbes et al. v. Davidson*, Orleans County, in about 1838.

Peck & Colby for defendant.

If the holder of a promissory note hold it as *collateral security* merely, the maker when sued upon it, may have the same defense to it, that he could have availed himself of, if the suit had been brought in the name and for the benefit of the original payee. *Sargent v. Sargent et al.*, 18 Vt. 371. Notes to 1 Amer. Lead. Cas. 336, and cases cited.

If the defendant proves that the note or bill was fraudulent in its

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inception, or fraudulently put in circulation the burden of proof will be thrown upon the plaintiff to show that he is a *bona fide* holder for value. 8 Kent's Com. 412. *Monroe v. Cooper*, 5 Pick. 79. *Heath v. Lawson*, 22 E. C. L. 78. *Solomons v. Bank of England*, 13 East. 136. 10 Johns. 231.

The refusal of the county court to set aside the verdict and grant a new trial was *matter of discretion*, and is not the subject of error. A writ of error will not lie for the awarding or refusing a new trial. *Richards et al. v. Wheeler*, 2 Aik. 369. 6 East. 383. 2 Tidd's Practice 1056. 5 Cranch. 11, 87. 6 Cranch. 206. 1 Peter's Con. 260, Note of cases. 1 Peters C. C. R. 159.

The opinion of the court was delivered by

REDFIELD CH. J. This case, as the defendant's testimony tended to prove, and as the jury seem to have found, in giving a verdict for defendant, was a bill of exchange, drawn by one Asa Low, at Bradford, Vermont, upon the defendant at Sherbrook, Canada East, payable to the order of the ~~drawee~~, at the bank in Boston, Mass., three months from date, and ~~being~~ accepted and indorsed, was deposited with a firm of merchants in Boston, to raise money for Low, and remit to him at Bradford. But they, before its maturity, passed it to one of their creditors as *security* for a note of some eleven hundred dollars, which they were owing them at the time, and which was overdue. The bill being dishonored was duly protested, and is sued in the plaintiff's name, for the benefit of the house to whom it was passed, as security for their note. The defendant is merely an accommodation acceptor.

The important question in the case is, whether the plaintiffs in interest, can be regarded as holders for value. No question was made but that they took the bill in good faith, and without knowledge, even of the defendant being merely an accommodation acceptor, or of any confidence between the parties of whom they took the bill, and any prior party. The inquiry seems naturally to resolve itself into two leading questions:

1. Did the plaintiff, in fact, and upon principle, give value for the bill, and can he, upon this ground merely, be justly regarded as a *bona fide* holder for value? It seems now to be pretty generally conceded, that one who takes a note or bill indorsed while current, in payment and extinguishment of a pre-existing debt,

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must be regarded as a holder for value. This is certainly the general course of decision upon the subject, with some exceptions to be sure, and we do not well see how it can fairly be argued that one who gives up a debt, and accepts a note or bill for the same, either on time or at sight, can be said to give no consideration for the same. He certainly does forego the pursuit of his own debt, and thus certainly puts himself, for the time, in a different, and in law, a worse situation. And this must be regarded as *prima facie* a foregoing of some advantage by the indorsee, and also an accommodation to the indorser, who may fairly be presumed to prefer this mode of meeting his debt. The transaction, therefore, possesses both the cardinal ingredients which constitute the textbook definition of a valuable consideration; it is a detriment to the promisee, and an advantage to the promisor. And it is no satisfactory answer to the case, to say the party who takes such bill or note, which proves unproductive, is in the same condition he was before. This is by no means certain. He has for the time, foregone the collection of his debt, and in such matters time is the essence of the transaction. And the debtor thereby gains time—it may be more or less—but of necessity, some time is thereby gained; and in such matters, this is always accounted an advantage, and is often of the most vital consequence to the debtor. How then can it fairly be said, that this mere suspension of the debt, during the currency of the note or bill, is no consideration? It seems to me such reasoning upon other subjects, indeed upon any subject, where one is not pressed to the wall by the necessities of his case, would almost be regarded as frivolous, surely it is scarcely specious.

But it has often been claimed, that there is an essential difference in principle between taking a current note or bill in payment, and as security for a prior debt then due. The transactions are certainly different in form, at least. But it seems to me, the ordinary case of taking such a security as payment, or as collateral to the prior debt, is the same in principle. One whose debt is due, in the commercial world, must pay it instantly, or he becomes a bankrupt. If, instead of money, he gives a bill or note, either on time or at sight, whether this is in form, in payment, or collateral to his debt, he gains time, and saves the disgrace and ruin consequent upon stopping payment. And, in either case,

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there is an implied undertaking that he shall wait upon his debtor, till the result of the new security can be known; and in both cases, when that proves unproductive, the creditor may pursue his original debt, or he may sue the prior parties on the new security, except his immediate indorser, and sue him upon the original debt, or he may sue him as indorser, and also all prior parties. In this state, and some other of the American states, where a note or bill, when taken as payment *prima facie*, extinguishes the debt, it is more common to sue the debtor or indorser. But according to the English law, and the general commercial law, taking a current note or bill for a prior debt, only suspends the right of action, till the dishonor of the new security. According to the general commercial usage, there is, then, no essential difference in principle, whether a current note or bill is taken in payment, or as collateral security for a prior debt, provided the note is, in both cases, truly and unqualifiedly negotiated, so as to impose upon the holder the obligation to conform to the general rules of the law merchant, in enforcing payment. If, indeed, the note or bill, is not so negotiated as to make the holder a party to it, or so as to require of him to pursue the strict rules of mercantile usage in making demand of payment, and giving notice of dishonor, so as to charge his indorser, with all the prior parties, upon the peril of making the note or bill his own, in payment of his debt, then he could not be regarded probably as having so taken the paper in the due course of business *bona fide*, and for value, as to shut out equitable defenses existing between the original parties. But ordinarily, we suppose it fair to conclude, that one who takes a note or bill negotiated to him while current, although merely as collateral to a prior debt, is expected to pursue the same course in enforcing payment, as if he paid money for the bill. And it is scarcely supposable that one so taking security for a debt, will not conduct differently on account of the security. It is of necessity he should, if he puts any confidence in its ultimate availability. And one would scarcely part with such security, unless he expected more or less indulgence on account of it. And when the prior debt is suffered to remain uncollected, it is, under the circumstances, fair to conclude, such was the stipulation. And the case of one who takes a note or bill so negotiated, whether in payment or in security of a prior debt, implicitly stipulating to

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forego the collection until the maturity of the collateral paper, when such paper proves unproductive, is the same in *both alternatives*. In either case he may pursue his remedy upon the negotiable paper, against all the prior parties, including his immediate indorser, or omitting him, he may pursue the other parties to the bill or note, and sue his original debt equally, whether he took the paper in payment or as collateral security of such debt, so that the difference between the two cases is merely formal. And if, in case of negotiating current paper as collateral security for a prior debt, the holder is not regarded as having taken it upon a valuable consideration, then the indorser may recall it at will. For, if there is no such consideration as to make the contract binding, it is revocable at will.

And if not upon consideration as to one party, neither is it as to the other. And in such case, the holder is merely the agent of the indorsee for purposes of collection, and as such agent, subject to his control, and bound to surrender the security at will. This was the view taken in *De La Chaumette v. The Bank of England*, 9 B. & C. 208. But that case turned upon the peculiar construction given to the facts of the case. Such is certainly not the common case of taken negotiable paper, as collateral security for a debt already due. The indorser, in such case, can no more recall or control the paper, than if he had received the money or goods in payment of the same. And when one takes a bill or note negotiated before maturity, in payment of money advanced or goods sold, such paper is, in fact, only collateral security for the money, or the price of the goods, and suspends such debts only till the dishonor of the bill, and is in law precisely the same thing as if the lender of the money or the vendor of the goods took a note for the money or goods, and a bill or note negotiated as collateral to such note, with the agreement to wait till such collateral was paid or dishonored. In all these cases it would never be claimed, that the indorser of such bill or note could take it out of the hands of the indorsee at will. But this he clearly might do, if such indorsee had not taken it upon consideration. If, for instance, one holds a debt due six months hence, and his debtor, as a mere volunteer service, indorses a current note or bill as collateral security, the collateral being due in three months, it could not be made to appear that such transaction, before the indorsee had

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been at any pains in the matter, was a contract upon consideration. The prior debt not being due, the creditor could forego nothing, and the debtor receive no advantage from the transaction. And the agreement to apply the collateral upon a debt not yet due—being without consideration—would, probably, in the first instance, be revocable at will, and so, also, as long as the parties remained in the same situation. It seems needless to spend more time to show that, upon principle, and in fact, one who having a debt due, accepts of his debtor, a current note or bill, indorsed to himself as collateral security for the debt, with the understanding that indulgence is to be shown on the prior debt, which, in fact, follows, does take such paper upon consideration, and gives value. Upon careful examination of this matter, it seems strange that such a question should ever have been raised; and it probably never would have been, but from the indefiniteness of the implied obligations growing out of such a transaction.

2. The more important question growing out of the case is, perhaps, what is the true commercial rule established upon this subject? And it is of vital importance in regard to commercial usages, that they should, as far as practicable, be uniform throughout the world. And such is necessarily the ultimate desideratum, and will inevitably be the final result. It is, therefore, always a question of time as to uniformity in such usages. The basis of such uniformity is convenience and justice combined. And until such rules become measurably settled by practice, they have to be treated as matters of fact, to be passed upon by juries; and when the rule acquires the quality of uniformity, and the character of general acceptance, it is then regarded as matter of law. It is thus that most of the commercial law has from time to time grown up. In the case of *Foster v. Pearson*, 1 C. M. & R. 49, Lord LYNDBURST, while Chief Baron of the Court of Exchequer, left it to the jury to determine, upon the evidence as to general commercial usage in the city of London, whether the plaintiff had taken the bill in the due course of business, and the full court held that the question was properly submitted to the jury. But in this case it seems to be recognized as settled law, that one who takes an indorsed note or bill still current, as collateral security for a prior debt, is a *bona fide* holder for value. So too, as early as 1814, in *Bosanquet v. Dadman*, 1 Stark. 1, Lord ELLENBOR-

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OUGH said,—“that whenever the acceptances exceed the cash balance, the plaintiff held all the collateral bills for value;” and the Court of Exchequer, in *Percival v. Frampton*, 2 C. M. & R. 180, decide the same point. PARK, B., says: “If the note were given to the plaintiffs as a security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration.” This is in 1835. And the same rule is certainly recognized in *Heywood v. Watson*, 4 Bing. 496. So also in *Bosanquet v. Foster*, 9 C. & P. 659, and *Same v. Corser*, ib. 664. *Palmer v. Richard*, is a full authority to show that it is not material whether the note or bill be deposited as security for an advance, or in payment, as some of the American cases seem to suppose. (1851,) 1 Eng. Law & Eq. 529; 15 Jur. 51.

In *Smith v. Braine*, 8 Eng. Law & Eq. 379, the proper distinction between accommodation paper, and paper fraudulently or illegally obtained or put in circulation is discussed, and placed upon the sensible and true ground no doubt, viz: that in the former case it is incumbent upon the maker or acceptor to show that the holder took it without consideration, the law making the ordinary presumption in favor of the holder of accommodation paper, which is, in fact made for the purpose of being put in circulation, and it being, therefore, fair to presume the holder took it for value, and *bona fide*. But in case of a note or bill, illegal in its inception, or fraudulently put in circulation, if these facts be proved in defense, it imposes upon the holder the necessity of proving in answer that he gave value for the paper. 15 Jurist 287. So also in *Mills v. Barber*, 1 M. & W. 425, it was long ago declared by Lord ABINGER, that the courts in Westminster Hall had, upon consultation, determined so to decide the law. The same distinction between accommodation paper, and paper fraudulently put in circulation, obtains in many of the American states. But this distinction is not, perhaps, very important here, inasmuch as the defendant claims both want of consideration for his acceptance, and fraud in putting the paper in circulation. *Harvey v. Towers*, 4 Law & Eq. 581; 15 Jur. 544.

But that the English law is fully settled, in favor of the indorsee of current negotiable paper, who takes it as collateral security for a prior debt, there can, I think, be no doubt, since the decision of *Poirier v. Morris*, 20 Law & Eq. 108; 22 Law Journal [N.

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S.,] Q. B. 313: 2 EL. & BL. 89, May, 1853, long since the present action was pending. This was an action upon a foreign bill which was negotiated to plaintiffs as security for a previous debt, and at the time of receipt passed to the credit of the debtor. It being dishonored, was protested, and therefore, charged in account against the debtor to balance the former credit, with the addition, of expenses. This would seem to be the usual course of doing business in Europe, and probably obtained to a considerable extent in the American cities, bills and notes being credited on receipt and charged upon dishonor, and all the collaterals being thus holden for the ultimate balance. This case was decided upon the general ground of the plaintiff's title at the time he took the bill as security for the balance of his account. Lord CAMPBELL, Ch. J., in giving judgment, says: "There is nothing to make a difference between this and the common case, *where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration.*" CROMPTON, J., says: "*Whether the bill was a collateral security or whether it had the effect of suspending the payment of the antecedent debt, is quite immaterial.* The plaintiffs had a perfect right to keep it." We think, therefore, it must be regarded as settled law in England at the present day, that such a bill or note taken as collateral security for a prior debt is taken in the due course of business and for value. Such being the settled rule of the English law, which is confessedly of great and paramount force upon a question of this kind, it is certainly desirable that, in regard to commercial law of such extensive application in the every day transactions of business, the law of the American states should also be uniform, and as far as reasonable and practicable, correspond with the acknowledged rule in other states and countries. The case of *Swift v. Tyson*, 16 Pet. U. S. Sup. Ct., upon the most elaborate examination and debate, adopts the English rule, and upon general grounds of settled commercial law. The decisions of the national tribunal are not indeed of any binding authority upon the general rules of the law merchant in a state court, further than they commend themselves to our sense of reason and justice. But such a decision as that of *Swift v. Tyson*, upon such a subject, could scarcely fail to be regarded as of very considerable force, and, if sound in principle, would, almost of necessity, ultimately form the basis of that uniformity of commer-

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cial law in these states which, sooner or later, must from its very great convenience, ultimately prevail. If not sound in principle, it would with difficulty be maintained even by that court.

Aside from our former remarks, going, as we think, to show the soundness of the rule laid down in *Swift v. Tyson*, the course of decision in the several states since the date of that decision, show a general disposition to adopt it. Indeed, in many of the states a similar rule prevailed before that. In Pennsylvania, *Petrie v. Clark*, 11 Serg. & R. 377, [1824,] recognizes fully the sufficiency of the consideration for the indorsement of a note or bill where it is taken in payment of a prior debt, and even as collateral security, if there is any agreement to wait on the prior debt, or any other damage is sustained in consequence, or the indorsee waives, or temporarily foregoes any of his other rights. This ground, assumed by GIBSON, J., at that early day, is certainly a very near approach to the rule of *Swift v. Tyson*, and the present English rule upon the subject. The only difference seems to be, in not holding that one who takes such paper as collateral security, is presumed to conduct differently on account of it. *Walker v. Geisse*, 4 Wharton 252, [Penn.] maintains very much the same ground.

In Maine, *Holmes v. Smith*, 16 Maine 177, decides, that if such paper be taken in payment of a pre-existing debt, it defeats all equitable defenses between the original parties. So also in New Hampshire, *Williams v. Little*, 11 N. H. 66. The decision in this case, that such paper being indorsed as collateral security for a loan made at the time, is not held for value, is certainly not justified by the decisions in any other state, so far as I can find. The New York courts, who have resisted this rule with the most unflinching pertinacity, do not so hold, but the contrary. *Williams v. Smith*, 2 Hill 301; *Watson v. Cabot Bank*, 5 Sanford 428; *Carlisle v. Wishart*, 11 Ohio 172, adopts the view of *Holmes v. Smith*. *Blanchard v. Stevens*, 8 Cush. 162, holds the same. So, also, *Norton v. Waite*, 20 Maine 175. So, too, *Bostwick v. Dodge*, 1 Douglass [Michigan,] 418. *Bush v. Pechard*, 3 Harrington [Delaware,] 385, goes to the same extent. So also the case of *Brush v. Scribner*, 11 Connecticut 388. In none of these cases except *Williams v. Little*, did the question arise, whether taking a note or bill indorsed as collateral security for a prior debt, is the same as taking it in payment. There is, therefore, every reason

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to suppose that no such distinction will be attempted in any of those states, unless it be the latter state. The case of *Barney v. Earle*, 13 Alabama 106, is to the same extent. In *Reddick v. Jones*, 6 Iredell [North Carolina,] 107, all distinction between taking negotiable paper in payment and as collateral security is repudiated, and both held to be valuable and sufficient considerations. In this case the paper was taken in payment, to be sure. So, also, in Georgia, *Gibson v. Conner*, 8 Kelly 47, expressly decides, that taking such paper as collateral security for a prior debt, is sufficient to shut out equitable defenses. So, also, in Indiana, *Valette v. Mason*, 1 Smith 89. And the same is held in New Jersey, *Allaire v. Hartshorn*, 1 Zabviskie 665; and in *Chicopee Bank v. Chapin*, 8 Met. 40, the same rule is recognized, although there the debt was created at the time the paper was negotiated as collateral security. Thus, we think, most of the states may be regarded as virtually having adopted the rule laid down in *Swift v. Tyson*. Ch. KENT, too, 8 Com. 96, and note, adopts the same rule, "as the plainer and better doctrine;" and *Allen v. King*, 4 McLean C. C. 128. It is to be borne in mind, that upon the other side New York contends strenuously, that such paper, taken either in payment or as security for a prior debt, is not held upon any sufficient consideration to shut out equitable defenses. I think the New York courts are consistent and sound, in denying all distinction between taking such paper in payment and as security for a prior debt. There obviously is no difference in regard to the consideration. But, even in New York, they have felt compelled to decide, that if such paper is taken in payment of a prior debt, being indorsed *without recourse*, the holder acquires perfect title, and may shut out equitable defenses between the original parties. *Bank of St. Albans v. Gilliland*, 23 Wendell 311. And if one gives his own note for such paper, it makes him a holder for value even in New York. 4 Barb. S. C. 304. These two cases seem very much like an abandonment of the principle of the rule even there. In Kentucky, too, a similar rule to that in New York, has prevailed. *Breckinridge v. Moore*, 3 B. Monroe 629. It is claimed too, that Virginia adopts the same ground, in *Prentice v. Zane*, 2 Gratten 262; but that case does not decide the point, a new trial being awarded for defect in the special verdict. Similar decisions have been made in Tennessee. In *Wormly v. Lowry*, 1 Humphrey

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468, GREENE, J. says: "Where one receives a note for a pre-existing debt, he parts with nothing. He is in the same situation after a successful defense by the maker, that he was before he took the note." This is certainly a remarkable instance of the *non sequitur*, to have imposed any delusion upon the mind of an experienced judge. He is in the same situation! But how can that be made to appear? He has let the collection of his debt or its security surcease for the time, and time is often fatal in such matters, and has incurred the expense and vexation of litigation, and is still in the same situation! Surely he is, in one respect; his debt is still unpaid; and in another also, which is somewhat important, he is again out of court. And it seems to me, that all refinements upon such absurd premises are always liable to involve one in similar contradictions and incomprehensible conclusions. I certainly feel no disposition to deal harshly or in a vain-glorious spirit, with the general arguments upon which this view is attempted to be maintained. It will be found ably stated by WALWORTH, Chancellor, in *Stalker v. McDonald*, 6 Hill 93.

This embraces most of the decisions upon the subject, both in this country and in England. And we could scarcely question, that the decided and increasing preponderance is in favor of the plaintiff's claim to hold the bill free from all equities of the acceptor; and coinciding as it does with our views of the reason and justice of the case, we could not hesitate to adopt it. We might, probably, have decided the case upon the Massachusetts law, as the contract seems, upon its face, to have been made with reference to that place. But as this question was not made in the court below, it does not properly arise here, probably. And we have chosen to put the case upon the general rule of the law merchant the ordinary presumption being, that the law of any particular place, in regard to commercial contracts, conforms to the general law, unless the contrary be shown. The party who claims the benefit of the law of a particular place, on the ground of it being different from the general rule of law on that subject, must prove the law of that place to be different, as he would prove any other fact in the case. This leaves that question open.

We do not understand the plaintiff to claim seriously, that he can recover the balance of this bill above the amount of the note which was due at the time of the negotiation of the bill, and

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as security for which it was negotiated. We do not see how he could claim that. The valuable consideration must be limited to the amount of the prior debt, due at the time of the negotiation of the bill.

1. A note or bill negotiated in security for a debt not yet due, is not upon sufficient consideration, ordinarily, unless the creditor wait in faith of the collateral after his debt becomes due.

2. If the debtor is notoriously insolvent before the note or bill is negotiated as collateral security, it is said the creditor can only stand upon the rights of his debtor.

3. If a note or bill is taken merely to collect for the debtor, to apply when collected, the creditor not becoming a party by indorsement, so as to be bound to pursue the rules of the law merchant in making demand of payment and giving notice back, the holder is merely the agent of the owner. *De La Chaumette v. Bank of England, supra. Allen v. King*, 4 McLean C. C. 128.

4. So, too, probably, if it were shown positively that the holder gave no credit to the indorsed bill, and did, in no sense, conduct differently on that account, he could not be regarded as a holder for value.

These four exceptions are probably based upon good sense, and may be found sustained by authority, but we have no occasion to say more in regard to them here. This case stands upon the general broad ground, of paper taken in the due course of business as collateral security for a debt due, and *prima facie*, the holder is under such circumstances to be regarded as holding the paper for a valuable consideration, and so entitled to recover against an accommodation acceptor.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF CALEDONIA.
APRIL TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

MOSES SOMERS & JACOB SULHAM *by Guardian v.* HANSON
ROGERS.

Infancy. Judgment. Writ of Error.

It is error for an infant defendant to appear and defend by attorney, and if he so appears, and judgment is rendered against him, he may reverse the same, by writ of error.

And if several defendants, one being an infant, appear by attorney, it is error, and on error brought, all should join, and the whole judgment will be reversed, both as to the adults and the infant.

WRIT OF ERROR. The assignment of errors in the writ were as follows:

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"And now the said Jacob Sulham, by his Guardian, Calvin Sulham, and the said Moses Somers, in fact say, that in proceeding to, and rendering judgment on said verdict, manifest *error* hath intervened, in this, *to wit*, that the said Jacob Sulham at the time of the trial of said issue, before said court, was under the age of twenty-one years, and incapable of appearing by himself or attorney in the defense of said issue before said court; and said court by the laws of the land, ought to have appointed the said Jacob Sulham, a Guardian to defend him in said suit, and on the trial of said issue; when in fact the said court did not appoint a Guardian for the purpose aforesaid; but suffered and permitted the said Jacob to appear by attorney, appointed by the said Jacob during his said minority, and at the trial of said issue, as appears of record. Therefore," &c.

To this writ and assignment of errors there was a demurrer and rejoinder.

B. N. Davis for plaintiffs in error.

1. Writ of error is the appropriate remedy for an infant to reverse a judgment, when the infant has appeared by attorney. *Chase by Guardian v. Scott*, 14 Vt. 77. *Castlemain v. Mundy*, 24 E. C. L. 30. 4 B. & Adol. 90, cited in the above case by the court. *Barber v. Graves*, 18 Vt. 290. 1 Swift's Digest 790.

2. An act which an infant is under a legal incapacity to perform is the appointment of an attorney. 1 Amer. Lead. Cas. 250-1, and cases there cited. 1 Swift's Digest 790.

3. All parties, whether plaintiffs or defendants in the original suit, must be joined in a writ of error. *Shirley v. Lunenburg*, 11 Mass. 379. 6 S. & R. 315. *Whitman v. Delano*, 6 N. H. 543. 8 Johns. 58. 2 Bibb. 392.

S. B. Colby for defendant in error.

1. Writ of error will not lie until a case is ended by final judgment, and this case stood on exceptions, at the time this writ was brought.

2. The court will on plaintiff's motion correct the judgment and only render judgment against one defendant.

The court never appoint a Guardian to prosecute, but only to defend an infant party. *Priest et al. v. Hamilton*, 2 Tyler 44.

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In the writ of error it is distinctly shown that the infant had a Guardian.

"That the Guardian of an infant in an action of trespass was not notified is no ground of abatement." *Potter v. Wright*, Brayt. 21.

Audita will not lie but only writ of error. *Chase v. Scott*, 14 Vt. 77.

"In *Ex. Contractu* if one avail himself of infancy, plaintiff may proceed to judgment against others, or *not*. *pros.* infant and proceed against others." *Humphrey v. Douglass*, 10 Vt. 71. *Allen v. Butler et al.*, 9 Vt. 122. 1 Wash. Dig. 467-8.

"Where an infant brings a writ of error to reverse, a judgment against him, the court only vacate the judgment, but do not set aside the proceedings altogether, and on reversing the judgment are to render such a judgment as the court below should have rendered." *Barber v. Graves*, 18 Vt. 290 to 293.

Judgment not void but voidable, *same*. *Blackman v. Dow*, referred to by Ch. J. WILLIAMS, in the above case.

The opinion of the court was delivered by

REDFIELD, Ch. J. It is agreed, in all the books, that it is error for an infant defendant to appear and defend by attorney, and that for this cause he may reverse the judgment, by writ of error. *Foxwist v. Tremaine*, 2 Saunders 212, and note (4.) and the numerous cases there cited. And it seems equally well settled, by the authorities, that if several defendants, one being an infant, appear by attorney, it is error, and on error brought, all shall join and the whole judgment shall be reversed, both as to the adults, and the infant. The reason assigned is that the judgment is entire. See the cases cited by Mr. Williams, in his note to *Foxwist v. Tremaine*. Also *King v. Mortboro & Crackie*, the latter being an infant, Cro. Jac. 808, which seems to go the full extent, and so far as I can learn, has always been followed, in the English courts. *Corex v. Lowther*, 1 Ld. RAYMOND 597, 600. 2 Strange's R. 783. 10 Petersdorff's Ab. 583, and note. *Bird v. Prigg*, 5 B. & A. 418, seems virtually to recognize the same rule, although no such point is involved in the case. And the rule seems to have been followed in this country. *Cruikshank v. Gardner*, 2 Hill 333. *Sargent v. French*, 10 N. H. 444. Bing. on Infancy 125, and note by Bennett, the American Editor.

Judgment reversed, and case remanded.

Doolittle et al. v. Holton.

JOHN DOOLITTLE & OTHERS v. BELA HOLTON.

[THIS CASE WAS DECIDED IN 1858.]

Ejectment. Sale of Real Estate and Reversion of Widow's dower by administrator ; presumptions in favor of the proceedings.

The question of presumption, in favor of the proceedings of an administrator, in the sale of real estate, should be submitted to the jury as an open question for them to determine, according to their view of the facts, and if not so submitted it is error.

As a general rule one presumption is not allowed to be based upon another.

EJECTMENT for certain lands in Lyndon.

Plea, the general issue, and trial by jury.

On the trial the plaintiffs offered in evidence :

1. A copy of a deed from Calvin Doolittle to Jesse Doolittle, dated February 12, 1797, of certain lands in Lyndon, including the land in controversy.

2. Copies of certain probate records, relating to the settlement of the estate of said Jesse Doolittle ; and particularly the granting of letters of administration on said estate to Riverius Burt, Feb. 24, 1807.

The appointment of William Cahoon and two others as a committee to set out dower in said estate to Eunice Doolittle, the widow of said Jesse Doolittle, Aug. 10, 1809 ; the warrant to said committee of the same date ; and also the return made by the said committee, dated Aug. 11, 1809. Also the returns of the appraisers and commissioners on the estate of the said Jesse Doolittle.

3. A copy of a deed from Eunice Doolittle to Oliver Doolittle, dated Oct. 30, 1810, of the land set out for her dower.

4. Copy of a deed, Oliver Doolittle to John Way, dated May 21, 1814.

5. Copy of a deed, John Way to William Way, dated Nov. 4, 1816.

6. Copy of a deed, John Way to William Way, dated Nov. 14, 1825.

7. Copy of a deed, William Way to Bela Holton, (the defendant) and Bela Holton, Jr., dated May 30, 1833.

Doolittle et al. v. Holton.

The plaintiffs then proved that John and Lucius Doolittle, and Eunice Marsh, wife of John Marsh, (the plaintiffs in this suit,) were the only children and heirs of the said Jesse Doolittle, and the marriage of John Marsh to said Eunice; and also proved that Eunice Doolittle, the widow of said Jesse Doolittle, died in December, 1848.

The possession of the defendant was admitted.

The defendant then offered in evidence all the records and original files in the probate office for the District of Caledonia, relating to the settlement of the estate of said Jesse Doolittle, particularly an order of said court extending the time allowed the administrator to settle the estate, for six months, made Feb. 19, 1809; a license of said court to the administrator to sell the real estate, granted Oct. 11, 1809; the discharge of Riverius Burt, as administrator, and appointment of Nathaniel Jenks, *de bonis non*; also the administrator's return of the sale of the real estate, including the reversion of the widow's dower, to Oliver Doolittle, Nov. 30, 1810.

And also the same deeds before given in evidence by the plaintiffs.

The defendant further proved, that immediately upon the execution of said deeds by Nathaniel Jenks, as administrator of Jesse Doolittle—and Eunice Doolittle to Oliver Doolittle, the said Oliver Doolittle went into possession of the lands described in said deeds, claiming to be the owner of the same, and that such possession and claim of title has been constantly and uninterruptedly continued by him and his subsequent grantees, down to the present time.

The court,—POLAND, J., presiding,—charged the jury, that after so great a lapse of time, and long continued possession by the defendant, and those under whom he claims, under the title derived from said administrator's deed, they should presume that said administrator acted under a proper license from the probate court; and that his proceedings in relation thereto, were regular and valid.

The jury returned a verdict for defendant.

Exceptions by plaintiffs to the charge as above detailed.

Geo. C. Cahoon for plaintiffs.

Doolittle et al. v. Holton.

T. Bartlett & Roberts for defendant.

The opinion of the court was delivered by

REDFIELD, Ch. J. The court have found it difficult to come to a full agreement upon all the questions which might be raised in this case. But we think it better not to require a further argument in its present form, inasmuch as we agree that it is proper the case should be opened, and be remanded to the county court for a fuller investigation of the facts.

The case is in some of its leading features similar to *Hazard v. Martin*, 2 Vt. 77, but in many important particulars, in its present form, it is far more defective than that case. It may be true, that the reasoning of the judge in that case, when applied to the facts in this case, would justify the finding of the jury. But that case was decided upon the ground, that the question of presumption should be submitted to the discretion of the jury, as an open question, for them to determine, according to their view of the facts. And this does not seem to have been done in the present case. This alone is error, for which all the judges before whom the case has been argued agree the case should be opened. And we are not now agreed to sanction the reasoning of the judge, in the case of *Hazard v. Martin*, to the fullest extent, and much less are we prepared to overrule that case. A decision of that kind, upon a subject of such controlling influence, in regard to the title of property, after having been acquiesced in for more than twenty years, it seems to us should be regarded, as having acquired the force of law. And if it is law at all, it is law according to its obvious import, as the profession, and the people would naturally understand it, and in the *sense*, in which it may be presumed they have acquiesced in it. For after property has been held and transferred for a long course of years, in faith of a decision of this court deliberately made and reported, it seems little less than trifling to unsettle the same question again. It is but inviting perpetual discussion of the same question and destroying all confidence in the stability of the determinations of the court. It falls little short of a want of proper self-respect. It is ~~what~~ the same members of the court would never do, in regard to one of their own decisions, and *a fortiori*, it ought not to be done by their successors, except upon grounds of obvious ne-

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cessity. The court are agreed in this. But still there is great room to question the extent of such a decision, in a case not precisely similar, in all respects. The question arises what facts of a group are to be regarded as controlling, or most conclusive of the right?

There is one very important fact in the case of *Hazard v. Martin*, which does not appear in the present case, that the administrator accounted fully for the money, which resulted from the sale. That fact alone is a decisive ground of acquiescence on the part of those receiving the money, and one which would be held binding upon them. And even though it were only received by the guardians of minor heirs, it would still be such an acquiescence in the disposition of the property as will bind them; perhaps some of the cases so hold. But this should regularly be shown, by some kind of positive proof, and not by mere presumption; ordinarily one presumption is not allowed to be based upon another. No doubt some proof still exists upon this point. And if so, it should certainly be put into the case. For it is a far more satisfactory ground of presumption, than the mere possession of the widow's thirds, which must be regarded as held under the widow's release of her right, until her death. And the acquiescence in the sale of the remainder of the estate, may be accounted for quite as naturally, upon the ground, that the price was adequate, and all which could have been expected, and therefore no resistance was made to it, or that it was, in all respects, regular; that a license existed which does not appear of record.

In regard to the validity of the order of sale of the real estate, this court, after such a lapse of time, and indeed, without that, would always incline to sustain the decision of the court, to whom the determination of the question belongs, unless it appeared from the record and proceedings, that the court made the order in a case not justifying such order, and thus went beyond their jurisdiction. In the present case, it is not recited that the order is made from the necessity of such sale to pay debts. But the amount of personal property, and of debts, render that highly probable, and we certainly could not presume against the order; we ought to make all fair and just presumptions in its favor. So, too, in regard to the requisite notice, the fact that the order is made, in such a case requiring such notice, is sufficient ground to pre-

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sume the notice, and so in regard to the propriety of selling the whole estate. All preliminary proceedings, necessary to make a judgment regular, will be presumed to have existed, unless the contrary appear. *Corliss v. Corliss*, 8 Vt. 372, and an indefinite number of cases to the same effect. This is, indeed a universal rule, in regard to the judgments of courts of exclusive jurisdiction, like the courts of probate, and indeed all courts of general jurisdiction.

We forbear to say more, at this time, in regard to the presumption, in favor of the deed of reversion being regular, on account of the long possession of the land, when no right of entry accrued to these plaintiffs till December, 1849. It certainly, upon general principles, does not, at first view seem to be a very satisfactory ground of presuming against the plaintiffs, and still is the very ground upon which the court profess to go in *Hazard v. Martin*, and which this court may hereafter regard as decisive of the case, but which we are not prepared to do at this time. It is a vastly important subject, and we should desire to proceed with the utmost caution, and be sure we had the full case before us.

Judgment reversed, and case remanded.

PHILANDER DAVIS v. SAMUEL FARR.*Sale of lands, or interest in, &c. Statute of Frauds, &c.*

The plaintiff sold to the defendant his interest in a certain farm; there was no writing of any kind between the parties, but the defendant agreed "to step into plaintiff's shoes" and to clear him from certain mortgage notes held by one D., and also a \$50 note given by plaintiff with surety to the said D. which had been indorsed on the mortgage notes as part payment; this sale was made in the spring of 1846, since which time defendant had been in possession of the farm; in March 1852, plaintiff paid one half the amount of the \$50 note and costs &c. for which he seeks to recover in this action; it also appeared, that the plaintiff, and one H. who had owned jointly with plaintiff, had, with the assent of defendant quit-claimed to said D., but that D. only claimed to the extent of his mortgage; the quit-claim to D. was before the sale by plaintiff to the defendant—*Held*—1. That plaintiff to recover for money paid to defendant's use, must show that the debt which he paid had become the proper debt of the de-

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defendant to pay, by a contract which was so authenticated, as to form the proper basis of an action in a court of law. 2. That the case came clearly within the provisions of the statute, (Comp. Stat. Chap. 84 § 1,) which provides, that "No action, shall be brought upon any contract for the sale of lands—or of any interest in or concerning them—unless in writing," &c.

ASSUMPSIT; the action was commenced before a justice of the peace, and came to the county court by appeal.

Plea, the *general issue*, and *statute of limitations*, both of which were traversed by the plaintiff. The case was tried by the court.

The plaintiff claimed to recover a sum of money paid by him to one Almon Stoddard, on a certain note.

From the evidence in the case, the court found the following facts: The plaintiff and one David Hudson were the owners of a farm in Newark, on which farm one Lucius Denison held a mortgage to secure the payment of certain notes.

In November, 1844, the plaintiff and said Hudson called on Denison and wished him to give up the notes and mortgage he held, and take their notes and a new mortgage. Denison declined to do this, unless they would pay him \$50, on the mortgage debt.

They procured Almon Stoddard to sign a note as surety for them to said Denison, for \$50, dated November 30, 1844, payable in one year with annual interest, and this note was indorsed by Denison on the mortgage notes.

In the spring of 1845, Hudson sold out his interest in the farm to the defendant, who went into possession with the plaintiff. In the spring of 1846, in April, the plaintiff sold his interest in the farm to the defendant, and the plaintiff then left the farm, and the defendant has had the sole possession and occupancy of the same ever since.

In consideration of this sale by plaintiff to defendant of his interest in said farm, the defendant agreed with the plaintiff "*to step into his shoes, and to clear him*" from the said mortgage notes, and also the said \$50 note given to Denison, as before stated.

No writing of any kind was executed between plaintiff and defendant, at the time of the trade, or at any time.

It also appeared, that in September, 1845, while plaintiff and defendant were in the possession of said farm together, the plaintiff and Hudson executed a quit-claim deed of the farm to said Denison, to prevent the crops growing on the farm from being

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attached, and this was known, and assented to, by the defendant. Said Denison had never claimed any other interest or title in said farm, than his mortgage upon it, and the title still remains in said Denison, as above stated, though the defendant has paid to Denison, a part of said mortgage debt. Stoddard, the surety paid said note of \$50, to Denison, and brought a suit against the plaintiff to collect one half the amount so paid; and in March, 1852, the plaintiff paid the same to said Stoddard.

The defendant objected to parol evidence being received, to prove the defendant's agreement above stated; but the court overruled the objection, to which decision the defendant excepted.

Upon the foregoing facts, the court,—POLAND, J., presiding,—rendered judgment for the plaintiff to recover of the defendant the sum so paid to said Stoddard, and the interest on the same since.

Exceptions by defendant.

A. J. Willard for defendant.

E. A. Cahoon and *H. S. Bartlett* for plaintiff.

This was a contract by which defendant agreed "*to step into plaintiff's shoes and clear him*" from the mortgage notes, and the \$50 note; for the non-payment of one half of the said \$50 note, this suit is brought. Defendant went into possession of the premises in April, 1846, and has had the sole occupancy ever since. The defendant has paid part of the mortgage debt, and virtually accepted a deed, by his assent to the deed executed by plaintiff to Denison.

The land was conveyed, the contract has been fully performed by both parties, nothing remaining but a payment of a part of the purchase money.

Indeed, this would seem to be a sale of a contract, or plaintiff's rights or chance in a contract, rather than a sale of land. But admitting the original agreement embraced an interest in land, this action at most, merely concerns the *price of land*, which by the statute of frauds is not required to be in writing, or to be proved by a written agreement. *White v. Miller*, 22 Vt. 380. *Thayer v. Vilas et al.*, 23 Vt. 494. *Hibbard v. Whitney*, 18 Vt. 21.

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This is only a demand for money arising out of a previous contract, and *assumpsit* will lie. *Wilkinson v. Scott*, 17 Mass. 249. *Goodwin v. Gilbert*, 9 Mass. 510. *Pomeroy v. Winship*, 12 Mass. 514. *Shepherd v. Little*, 14 Johns. 210. *Bowen v. Bell*, 20 Johns. 888.

2. The statute of limitations (if the defendant urges it) does not apply. This is a contract of indemnity by which defendant is to clear plaintiff from the note; not a promise to pay the note the day of its maturity. Indeed, the note had been long *over due* when this agreement was made. The statute began to run at the time plaintiff paid the note. *Crofoot v. Moore*, 4 Vt. 204.

The opinion of the court was delivered by

REDFIELD, Ch. J. This is an action of *assumpsit*, declaring for money paid, and also on a special contract. The consideration alleged in the special contract is the conveyance, by the plaintiff of his equity of redemption in certain premises, to one Lucius Denison, for the benefit of the defendant.

The facts proved are, that plaintiff and one Hudson were the owners of the equity of redemption, and defendant had bought Hudson's right, by verbal contract, and gone into possession, and was carrying on the land jointly with the plaintiff. To prevent the attachment of the crops, by creditors, but whose creditors, or whose interest, is not stated, the plaintiff and Hudson, with the knowledge and assent of defendant, conveyed the land by quitclaim, to Lucius Denison, who held a mortgage on the premises. This was in September, 1845. In April, 1846, the plaintiff "sold his interest in the farm to defendant, and left it, and defendant has occupied it since." The case states, that in consideration of this sale, by plaintiff to defendant, *of his interest in said farm* the defendant agreed with the plaintiff "to step into his shoes and to clear him" from said mortgage notes, and also a \$50 note given by plaintiff with surety to Denison, which had been indorsed on the mortgage, as part payment. The plaintiff paid half the amount of the \$50 note and costs, &c., in March, 1852, which he seeks to recover in this action, and for which the county court rendered judgment in his favor. The defendant plead, and relied upon the statute of limitations in his defense, and also that the contract was one upon which the plaintiff could not recover, at

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law, without showing the same to have been reduced to writing. The case states that "no writing of any kind was executed between the plaintiff and defendant,—at any time." The defendant objected to the kind of evidence offered by plaintiff, and to the judgment in his favor, and took exceptions upon both points. There is no testimony in the case tending to show, that at the time of the conveyance of plaintiff's title to Denison, the sale to defendant was in contemplation by either plaintiff or defendant.

It seems to us difficult to sustain the judgment below, upon three grounds.

I. There is no testimony in the case, and of course, it was not within the discretion of the county court as triers of the fact to find, that the conveyance to Denison constituted the consideration of the defendant's undertaking. The case indeed finds the contrary, when it states that, "In consideration of this sale by plaintiff to defendant, (which was in the spring of 1846,) of his interest in said farm, the defendant agreed with the plaintiff," &c. The plaintiff then did not prove either of his special counts. He could only recover then as for money paid to defendant's use. To sustain this he must show, that the debt which he paid had become the proper debt of the defendant to pay, by a contract which was so authenticated, as to form the proper basis of an action, in a court of law. This brings us to the second point.

II. The statute of this state, Comp. Stat. Chap. 64 § 1, provides, that "No action—shall be brought upon any contract for the sale of lands,—or of any interest in or concerning them." The case here states, in express terms, that the consideration of defendant's promise, upon which judgment was given, "was the sale by plaintiff to defendant of his interest in said farm," and that "no writing of any kind was executed upon the occasion, or at any other time," in regard to the matter. How it is possible then to escape from the statute, short of disregarding its express and most explicit terms and obvious import, it is certainly difficult for us to comprehend. It is true, that if the interest in the land, which forms the substratum and consideration of the contract, has been conveyed, by proper conveyances, the case is said to be so far an executed contract, that it is taken out of the evil, and virtually out of the terms of the statute, and an action will lie for the money, which was the price of the conveyance. *Brown v. Bell*,

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20 Johns. 388. *Hibbard v. Whitney*, 18 Vt. 21, and cases cited. And it makes no difference whether the action is by the vendor or vendee of the land. It is equally upon a contract for the sale of an interest in land. There is perhaps this difference in the position of the vendor and vendee. If the former has performed on his part, by conveying the land, the case is thereby taken out of the statute, and he may sustain an action for the money, while if the vendor has paid the money, he can only recover back his money, and not the price of the land, which he would be entitled to claim, if the contract were in writing. Payment of the price is not such part performance as will take the case out of the statute.

As this case stands, it might be possible perhaps to regard Hudson's conveyance to Denison, as a conveyance for the benefit of defendant, so far as his half was concerned, which defendant had before purchased, as a trust might possibly thereby result in favor of defendant. But this is questionable. But in regard to the conveyance of plaintiff's interest to Denison, it either left still an equity of redemption in plaintiff, as before, or a trust in his favor, which might enable him in equity to compel Denison to convey upon payment of the sum due upon the mortgage. But clearly the *interest* in the land, for which defendant promised to pay, was in plaintiff, and without some conveyance, in writing, it will be impossible for defendant to so connect himself with the right to redeem, as to sustain a bill for that purpose, in his own name against this mortgage. It is probable, that the contract has been so far performed, as to enable the defendant to sustain a bill in equity against Denison and the plaintiff, to obtain leave to redeem. But it is clear the defendant can maintain no suit upon the contract to compel plaintiff to pay damages for not conveying his equity of redemption, and should defendant pay the mortgage, as he already has in part, it would only vest plaintiff's half of the title, either in himself or in Denison, in trust for him. There has as yet, been created no privity, between Denison and defendant, by any contract, which the law recognizes, as sufficient for that purpose. We think, therefore, the defendant is not liable to an action upon this contract. If he chooses to lose, what he has paid and let the land go to the plaintiff, he is still at liberty so to do, having never entered into any contract, which the law recognizes

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as the proper basis of an action. A decision controlling this case in many of the points was made in this county some years since, which I do not find reported.

III. In regard to the statute of limitations, it is no doubt a full defense to the action, unless defendant's promise was a mere indemnity. But it seems to have been a promise "to stand in plaintiff's shoes." How defendant could do this, and not promise to pay the notes, it is not easy to perceive. The other portion of the contract looks more like an agreement to save harmless. But if the contract had been in writing, it seems to me, the plaintiff might have sued immediately and recovered the full amount which defendant undertook to pay, as was held in a recent case in Windsor county. At all events the second point presents insuperable difficulties to any recovery.

Judgment reversed and case remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ESSEX.
APRIL TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

THOMAS ALLEN v. ANDREW TAYLOR & OTHERS.

*Review. Depositions. Declaration for betterments in the action
for ejectment.*

A declaration for betterments, filed in action of ejectment, is a mere adjunct to the action of ejectment, and does not come within the provisions of the statute, (Comp. Stat. 221 § 17,) giving a right of review, and in a cause or suit founded on such a declaration, neither party is entitled to a review.

The initials of a middle name is no part of the name, and the omission or misstatement of them in a deposition, in describing the parties or the deponent, forms no good ground of objection to the deposition.

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THIS was a declaration for betterments, filed in an action of ejectment.

Plea, the general issue, and trial by jury.

On the trial the plaintiff offered the deposition of one Joseph A. Martin, to the admission of which the defendants objected, on the ground that the parties to the suit were not correctly described in the certificate of said deposition (the omission or mis-statement being in relation to the initials of the middle name of some of the parties.)

The County Court,—POLAND, J., presiding,—overruled the objection, and admitted the deposition. To this decision of the court the defendants excepted.

After the jury had returned a verdict for the plaintiff, the defendants moved for a review of the said cause, which motion was overruled by the court, and a review denied.

To which decision of the court the defendants also excepted.

W. Heywood, Jr. for defendants.

The statute provides that in all civil causes tried before the county court, either party may once, and no more, review his cause to the next term of said court.

I contend that this declaration for betterments was a cause tried before the county court.

The Compiled Statutes, 286 § 17, provides for the filing of the declaration. In section 18; it is twice spoken of as an action of the case; and it directs that the action of ejectment shall be stayed until the action of the case is ended. The same phraseology is used substantially in sections 19, 22, 23.

This point was not properly before the court in the case of *Gage et al. v. Ladd*, 6 Vt. 174. The remarks on this point were made by way of advice.

The case spoken of by Judge WILLIAMS, as having been decided in Orleans County, must have been decided under some statute very different from our present law; but as the time when the decision was made is not stated, it is impossible to ascertain what it was.

But the exception taken to the deposition is fatal to the case; and if so, the review is of no consequence.

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J. D. Stoddard and J. Steele for plaintiff.

The only reliable objection to the judgment below, seems to be the court's refusal to grant the defendants a review.

1. Can the error complained of be reached by exceptions.
2. If the court can revise the judgment below in this manner, it is a sufficient answer, that in the case of *Gage et al. v. Ladd*, 6 Vt. 174, it was adjudged that the right of review in those proceedings was not given, and that under subsequent revisions of our statute the original text relating to this form of remedy is literally retained.

The opinion of the court was delivered by

ISHAM, J. The case of *Gage v. Ladd*, 6 Vt. 174, seems to dispose of the question arising in this case, as to the defendants' right of review. The Comp. Stat. 221 § 17, gives the right of review, with few exceptions, "to either party in all civil actions, tried before the county court." The provisions of this statute, however, do not extend to a declaration for betterments, filed in the action of ejectment, after a final judgment in the case; as such a declaration is not a cause or suit within the letter or spirit of the act. From the various provisions of the statute, it is evident, the legislature never contemplated such a declaration to be the commencement of a new action, but merely as a continuation of the original suit in which it was filed. It was designed, in that mode, to ascertain the damages sustained, and adjudicate the respective rights and claims of the parties, growing out of the use and occupancy of the land, for which the action of ejectment was brought. The action of ejectment is the principal cause or suit, in which the right of review exists. The declaration for betterments is an incidental prosecution, a mere adjunct to the action of ejectment. The case of *Hall & Parker v. Hall*, 24 Vt. 637, recognized the same principle, in which the case of *Gage v. Ladd*, was referred to and approved. We must regard this question as having been settled by those authorities, and that the review, in this instance, was properly refused.

We see no objection to the deposition of Mr. Martin. It has been frequently decided in this, and other states, that the initials of a middle name is no part of the name; and that the omission

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or mis-statement of them will be no ground of objection. It is rendered certain in what cause, and between what parties the deposition was to be used.

Judgment of the County Court affirmed.

WM. C. MORGAN AND WM. M. STEARNS v. EZRA & JEROME
BARKER AND O. LAWRENCE.

Trespass. Estoppel or Bar to a recovery, &c.

The plaintiffs commenced their action of trespass against one H. and the defendants, for thirty-two pine trees and some other timber; in the county court the plaintiffs recovered against the defendants for other timber, and a verdict passed in favor of H., who cut the said pine trees and sold them to the defendants, the plaintiffs failing to make out title to the land on which they were cut; and this verdict as to H. was final, and the case as to him was carried to the Supreme Court, and there affirmed; the defendants reviewed, and, at the trial, gave notice of the final judgment in favor of H., as their defense so far as the cutting of the said pine trees are concerned; the plaintiffs failed to recover of the defendants, except for the said pine trees so cut by said H.; and the defendants claim that plaintiffs cannot recover of them, for the same trees—*Held*—that the judgment in favor of H. is a conclusive bar against a recovery by plaintiffs, and that it quieted the title to the trees in H., and that this bar must extend to all who stand in privity of estate with H.

It is not important or necessary, that the estoppel, or bar, should exist before the commencement of the action.

TRESPASS for thirty-two pine trees, and some other timber, taken from lot No. 4, in the 9th Range of lots in Victory. The declaration contained two counts. The plaintiffs claimed under one Samuel A. Chandler. The writ was originally against one Isaac R. Houston and the present defendants, and it appeared that said Houston cut the thirty-two pine trees and drew them to Moose River, and there sold them to the defendants who took them down the river. The jury returned a verdict in favor of the said Houston, the plaintiffs failing to show sufficient title in Chandler, under whom they claimed. The case was carried to the Supreme Court as to said Houston, and judgment there affirmed.

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The facts, relating to the questions passed upon, sufficiently appear in the opinion of the court, by REDFIELD, Ch. J.

In the trial below the jury, under instruction of the court, returned a special verdict, in which they found defendants guilty, for timber taken from said lot No. 4, (it being the timber cut by said Houston,) and not guilty for timber taken from lot No. 9.

Wm. Hegwood, Jr. and *H. A. Fletcher* for defendants.

The judgment in favor of Houston, is an estoppel in favor of these defendants. If this were not so, Houston would yet be liable for this very timber; he having sold it to these defendants as his own property, and in such case there is an implied warranty of title. 2 Kent's Com. 374. 1 Ld. RAYMOND 398. 1 Salk. 210. *Strong v. Barnes*, 11 Vt. 221.

The adjudication binds these plaintiffs for the reason that they were parties to it; and it is good in favor of these defendants, for they were privy by succession to the rights of Houston. 1 Greenleaf's Ev. 189, 522, 523 and 524. *Wright v. Hazen et al.*, 24 Vt. 143. *Aiken et al. v. Peck*, 22 Vt. 255. *Perkins v. Walker*, 19 Vt. 144. *Burton v. Wilkinson*, 18 Vt. 186. *Gray v. Pingrey*, 17 Vt. 419. *Green v. Clarke*, 13 Vt. 158. *Isaacs v. Clarke*, 12 Vt. 692. *Dorset v. Manchester*, 3 Vt. 370.

Geo. C. Cahoon for plaintiffs.

Claimed, that the previous judgments in the case from which the respective parties at different times took their review, after such reviews were taken, retained none of their pristine virtues of conclusiveness, but each became on such review vacated, and hence the trial *de novo*, to determine the right; each review being but another name for the right of each respective party to have a new trial. Each successive one abridging the right, till the chances for further litigation are exhausted. Which when done, the last trial becomes the finality of the matter, each party using rightfully each, every and all positions in prosecution or defense known in the wisdom of the law.

Had the former judgment been for the plaintiffs against Houston alone for the trees, then the other defendants might perhaps have pleaded the former recovery in bar to this; but no such fact exists on which to theorize; plaintiffs recovered of no one for

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said trees, and no one has in any manner paid for the same to plaintiffs, who on the finding of the jury have been adjudged the legal owners, and the defendants the trespassers. The question as to the title in the premises, and of the timber when severed therefrom have already been before the court, and passed upon on a former bill of exceptions. *Goodwin v. Hathaway*, 1 Vt. 485. *Yale v. Seeley et al.*, 15 Vt. 221. *Lansing et al. v. Montgomery*, 2 Johns. 382. 1 Chit. Pl. 65 to 72. 6 Taunt. 47. Bul. N. Pri. 41. 12 Mad. 448. 1 Wilson 328. 2 Saund. Pl. & Ev. 392-3 and 863-4.

The opinion of the court was delivered by

REDFIELD, Ch. J. In this case the plaintiffs make title to the lands, in question, being lot No. 4, in Range 9, in Victory, under Samuel A. Chandler. The trespass complained of is cutting thirty-two pine trees, on said lot. These trees were cut by one Houston, who was a party to this suit, at the two first trials, in the county court, and by him sold to the other defendants, which is the mode, in which a cause of action is made out against them.

At the two former trials in the county court, the plaintiffs failed to show title to the lot, on which these trees were cut, in Chandler, and consequently, in themselves, and thus failed to recover, for the cutting of these trees, against any of the defendants. At the last trial they did recover, against the present defendants, for other timber, a verdict passing in favor of Houston, on the ground stated above. Houston became separated from the other defendants, his case; being a final verdict, was carried to the Supreme Court, and was there affirmed. The other defendants reviewed, and, at the trial, gave notice of the final judgment, in favor of Houston, as their defense, so far as the cutting of the thirty-two trees is concerned, they having purchased of Houston, and his title being quieted by the final judgment in his favor, as the defendants now claim. The plaintiffs having in the last trial, in the county court, failed to recover of these defendants, except for the same thirty-two trees, cut by Houston, they now claim that the plaintiff cannot recover of them, for the same trees.

And in this, it seems to us, the defendants are well founded, in law. This defense is not altogether of the nature of a strict estoppel. It is rather of the nature of a former recovery, for the same cause of action. For a failure to recover is as conclusive a

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bar as a recovery and payment of the judgment, so far as the party to that judgment is concerned. As to him, the judgment is conclusive, it being shown on all the trials, that he cut the trees, and the plaintiffs failing to show title in themselves, the judgment conclusively establishes the right to hold the trees, against the plaintiffs. And this bar must extend to all who stand in privity of estate with Houston. And privies in estate include all who derive title under the party. This is familiar law, and the necessity of such a rule is forcibly illustrated, in the present case. For if the plaintiffs could here recover of these defendants, and they of Houston, of which there can be no doubt, the plaintiffs would effect circuitously, a reversal of the judgment against them, in Houston's favor. This would be at variance with the well settled principles, upon this subject. It was never regarded as of any importance, that the estoppel, or bar, should exist, before the commencement of the action, if properly pleaded, of which no question seems to be made, or probably could be here. The result is that the judgment must be reversed on this ground.

We have taken no pains to examine the other ground. The contract with Chandler, who owned the land, being in writing, it might probably be so far conveyed, by merely verbal contract, as to give the plaintiffs the rights conveyed, by Chandler. Whether the writing of Chandler was intended to convey any present interest is very questionable.

In terms Chandler agrees to sell, and the other party agrees to purchase, thus making it strictly executory. And as it looks to a future performance, and the continuing rights of the second party depend, upon continuing performance on their part, it would seem more consistent, with the usual construction of such contracts, to hold that either party might refuse to go forward with the contract and thus drive the other party, to his claim for damages, and that no title vested in the timber, until, or as fast as it was cut.

Judgment reversed, and case remanded.

NOTE.—The character and effect of the contract with Chandler and the precise title, or right, acquired by it, is undoubtedly altogether a question of law, in regard to which the jury have no discretion.

Cheney et al. v. Cheney et al.

WARNER CHENEY, IRA CHENEY, STEPHEN WHITE & MATILDA, HIS WIFE, ALBERT A. CHENEY AND LAURA A. CHENEY v. DANIEL CHENEY, JOHN STOCKWELL, AND REUBEN LAMPSON.

Ejectment. Several plaintiffs counting on joint title, must show title at the time of trial. Evidence.

In ejectment, if several plaintiffs count upon a joint title and right of possession, they must each and all show, that such legal title and right of possession exists at the time of trial, as well as at the commencement of the suit, or they cannot sustain the action.

Evidence may be introduced under the general issue, in ejectment, where there are several plaintiffs, disproving their joint title and right of possession; for, it is the denial of a fact which the plaintiffs must in the first instance show in support of their action.

EJECTMENT for lots No. 8, 3d division, right of Oliver Robinson, and lot No. 3, 4th division, right of Joel Grant, in Lunenburg.

Plea, the general issue, and trial by jury.

On the trial, the plaintiffs, to support the issue on their part, read in evidence: 1. A deed from Phinehas Dodge to Daniel Cheney, dated January 4, 1796, of sixty acres of the easterly part of lot No. 8, 3d division in Lunenburg, the same being described by metes and bounds.

2. A deed from Z. Eager to Daniel Cheney, dated February 6, 1796, of fifty acres, being one half of the 4th division lot of the right of Joel Grant, in Lunenburg.

3. A copy of the probate records, of the appointment of a committee, consisting of Walter Bloss, William Heywood, and Robert W. McCoy, by the probate court for the district of Essex, to set off the widow's dower, and make a division of the estate of Daniel Cheney, among the heirs of said estate; and also the report of said committee setting out dower of the widow, Rebecca Cheney, in said estate, and a division of the residue of said estate, among the heirs thereto.

It was admitted by the defendants, that the persons named as heirs in said return, were the proper legal heirs to the said estate of the said Daniel Cheney. And also that the reversion of the

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widow's dower had not been divided among the heirs to said estate.

It was also admitted by the defendants that the plaintiffs are the legal heirs of Thomas Cheney, who was a son, and one of the heirs of the said Daniel Cheney.

The plaintiffs also read in evidence, a deed from Laura A. Cheney and Albert A. Cheney, (two of the plaintiffs,) to Warner Cheney, (one of the plaintiffs,) dated May 14, 1849, of all their interest in lots No. 3, 4th division, and No. 8, 8d division, and especially in that part set to Rebecca Cheney.

Also a deed from said Warner Cheney, to Mary Nasmith, dated August 18, 1849, of the same premises.

The plaintiffs also proved, that said Rebecca Cheney went into the occupancy of the land set out to her for dower, by said committee, and continued to occupy the same with one of her sons, until her death in 1840 or 1841; and that the defendants, Stockwell and Cheney had been in the occupancy of distinct and several portions of the land, set out as dower, as aforesaid, since the spring of 1845, each claiming the portion occupied by himself, in his own right, under deeds from the widow Gates. It appeared, that defendant, Lampson, at the time the suit was brought, (March 26, 1851,) was living in a house upon that part of the lot, occupied by the defendant, Stockwell.

The defendants insisted, that as they occupied distinct portions of the land sued for, under separate deeds, the plaintiffs could not maintain a joint action against them, but the court overruled the objection. To this decision of the court the defendants excepted.

The defendants then read in evidence the following deeds:

1. A deed from Warner Cheney, (one of the plaintiffs,) to the defendants, Cheney and Stockwell, dated June 9, 1851, of the said widow's dower as occupied by them respectively.

2. A deed from Stephen White and Matilda White, wife of said Stephen, to defendants, Cheney and Stockwell, dated June 9, 1851, of their right in the dower of Rebecca Cheney.

3. A deed from Franklin Boody and Laura A. Boody, his wife, to the defendants, Cheney and Stockwell, dated May 13, 1852, of their right in said Rebecca Cheney's dower.

The defendants also proved that since the commencement of the plaintiffs' suit, and before the date of said last mentioned deed,

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the said Laura A. Cheney, (one of the plaintiffs,) intermarried with said Franklin Boody.

The County Court, May Term, 1853,—POLAND J., presiding,—upon the above evidence instructed the jury, that the plaintiffs could not recover in this action. The jury returned a verdict for the defendants.

Exceptions by plaintiffs.

Geo. C. Cahoon for plaintiffs.

Can the suit rightfully brought by the plaintiffs, be defeated by the defendants in this manner, by connivance with a part of the plaintiffs, and with those who had previously conveyed to the prejudice of *bona fide* purchasers, who brought the suit in their names, and of the other owners concurring, to obtain possession and perfect their rights? It appears to us not, and we are corroborated in this opinion, by the following authorities. *Nason v. Blaisdell*, 17 Vt. 216. *Edwards v. Roys*, 18 Vt. 473. *U. V. M. v. Joslyn*, 21 Vt. 52. *Edwards v. Parkhurst*, 472.

Wm. Heywood, Jr. for defendants.

Cited *Beach v. Beach*, 20 Vt. 83. *Edgerton v. Clark et al.*, 20 Vt. 264.

The opinion of the court was delivered by

ISHAM, J. The judgment of the county court in this case must be affirmed. In order to sustain this action of ejectment, the plaintiffs must show a legal title, and the right of an immediate possession to the premises described in the declaration, not only at the commencement of the suit, but also at the time of trial and judgment. *Benton v. Austin*, 4 Vt. 105. *Tryon v. Tryon*, 16 Vt. 313. *McDaniel v. Reed*, 17 Vt. 674. If several plaintiffs count upon a joint title and right of possession, the same principle applies. The legal title and right of possession must exist in each and all of the plaintiffs, at the time of recovery, or they cannot sustain the action. For this reason, evidence may be introduced under the general issue, disproving that title; for it is the denial of a fact which the plaintiff must prove, in the first instance, in support of his action. *Jackson v. Dumont*, 9 Johns. 55.

The case under consideration falls within this general principle.

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It is stated in the exceptions, that on the 9th of June, 1851, Warner Cheney, one of the plaintiffs, conveyed his interest in the land to the defendants, Cheney and Stockwell, and that afterwards Stephen White and his wife Matilda, as also Franklin Boody and his wife, after the commencement of this action, conveyed all their right and interest in this land, to the same defendants. Those persons, therefore, had no title or right of possession to the premises, at the time of the trial of the case. They could neither sustain an action themselves for the recovery of the land, nor join with others who may have had a title.

This objection is not avoided by the consideration, that the deeds were executed while the defendants were in adverse possession of the premises. That result would follow if the conveyances had been made to third persons, not in possession. At common law, and under our statute, deeds executed under such circumstances are void and convey no legal title as against the party in adverse possession, though as between the parties, the deeds may be good, and will convey an equitable interest. *Edwards v. Roys*, 18 Vt. 473. *University of Vt. v. Joslyn*, 21 Vt. 52. *Edwards v. Parkhurst*, 21 Vt. 472. But at common law, and under our statute, such conveyances are good and effectual to convey the legal title and right of possession, when made to those in actual possession, though that possession may be adverse. This doctrine was directly decided in the case of *Jackson v. Dumont*, 9 Johns. 55.

By those conveyances, therefore, the defendants, Cheney and Stockwell, have that interest and title to these premises, which their grantors had; and they hold the same in common with those plaintiffs who have not conveyed, and who still retain their right and title to the land. Those plaintiffs, therefore, who have in that manner conveyed their right and interest in the premises to the defendants, cannot be parties to a suit or judgment for the recovery of the land, and its possession, from those to whom they have conveyed.

This case is not affected by the act of 1851, p. 5, in which it is provided that "whenever the title of the plaintiff in an action of "ejectment shall expire or be transferred, after the commencement of such action, the suit shall not thereby fail, but the plaintiff may recover judgment for his damages, for the detention of "the premises during the continuance of his title, with costs." If

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this statute was made to apply to a case of this character, the rule of damages, in many cases, would be different with some of the plaintiffs, from what it would be with others. The statute, according to its letter and spirit, extends only to cases, where the *entire interest and right of all the plaintiffs* has been transferred. If all these plaintiffs had joined in that conveyance, the statute probably would have had effect. But it was never designed to permit those who had no title, at the time of the trial, to join in the prosecution of a suit with those, whose title may not be controverted.

The judgment of the County Court must be affirmed.

REUBEN C. BENTON v. WALTER G. MCFARLAND.

Ejectment.

In an action of ejectment brought by the plaintiff, to recover, as tenant in common, an undivided part of the premises, on the ground of the defendant's refusal to recognize his rights as co-tenant, it appeared that both plaintiff and defendant claimed under one D., who first mortgaged the premises, in May 1846, to secure the mortgagees, for entering into a recognizance in the sum of \$250, for D's appearance, at the county court, in a criminal case; the recognizance became forfeit in May, 1846, and at that Term of court was chancered to \$100, and costs \$14. In February, 1847, one A. levied upon the whole of D's equity of redemption, treating the mortgage as an incumbrance to the full amount of the recognizance of \$250; said A. in March, 1847, conveyed his interest to the defendant's grantor, who in May, 1847, conveyed by deed of warranty to the defendant. In December, 1847, the defendant's grantor paid \$114, the amount recovered on the said recognizance, and in November, 1848, the plaintiff levied upon an undivided portion of the premises; the same which the whole amount of the execution bore to the value of the premises. Under these facts, it was held, that the mortgage title must surmount, and override, any title which plaintiff could possibly obtain of D. of a date posterior to the title of the mortgage, which is now vested in defendant, and which will effectually prevent the plaintiff from recovering in ejectment, against the defendant.

EJECTMENT for lot No. 48, in the Fifth Division, in the town of Lunenburg.

Plea, the general issue, and trial by the court.

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On the trial, the plaintiff read in evidence, a copy of a deed from Erastus Olcott to Benjamin Dow, dated February 5, 1839, of the west half of said lot No 48. Also a copy of a deed from Randall L. Olcott to Benjamin Dow, of the same date of the east half of said lot No. 48. The plaintiff also offered in evidence, the copy of a record of a judgment recovered, in his favor against the said Benjamin Dow, before Josiah Brooks, Jr. Esq., a justice of the peace, on the 26th day of June, 1849, for \$48,21, damages, and \$1,91, costs of suit. Also a copy of the record of an execution on said judgment, and levy of the same upon an undivided portion of said lot No. 48. Also a copy of the record of an execution in favor of Alden Dow against said Benjamin Dow, and a levy of the same upon Benjamin Dow's equity of redemption in said lot No. 48. Also, a copy of a mortgage deed from said Benjamin Dow to Stephen Howe, James Morse, Jr. and John W. Putnam, dated May 28, 1846, of said lot No. 48, conditioned to secure and indemnify the said mortgagees, for being recognized in the sum of \$250, for the said Benjamin Dow's appearance at the Term of Essex county court. Also, the record of the recognizance mentioned in the condition of said mortgage deed; and also the docket of Essex county court of May Term, 1846, from which it appeared, that at said Term said recognizance became forfeited. And also the docket of said court for May Term, 1847, of a suit on said recognizance against said Howe, Morse, and Putnam, showing that said recognizance was by the said court chancere d to the sum of one hundred dollars, and that the costs of suit on said recognizance were \$14,07; and that execution issued therefor September 7, 1847.

The defendant, then offered in evidence, a certified copy of the record of a judgment recovered by Alden Dow against Benjamin Dow, at the December Term, 1846, of the Essex county court, for the sum of \$327,54, damages, and \$10,62, costs; and also the record of an execution on said judgment, and levy thereof upon Benjamin Dow's equity of redemption in said lot No. 48. The defendant also read in evidence, a quit-claim deed from Alden Dow to Jonathan D. Stoddard, dated March 29, 1847, of said lot No. 48. Also a deed from O. Dow, as agent of Benjamin Dow to Lyman Hibbard, dated April 19, 1847, of said lot. Also a warranty deed

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from said Stoddard and Hibbard to himself, dated May 1, 1847, of said lot No. 48.

The defendant, also, offered in evidence, the dockets of Essex county court for May Term, 1846, showing an appearance, in the case of *State v. Benjamin Dow*, for the defendant by Mr. Cooper, and also of December Term, 1846, and May Term, 1847, showing an appearance by Mr. Stoddard, for defendants, in the case of *State Treasurer v. Benjamin Dow and others*.

The defendant admitted, that Benjamin Dow went into possession of said lot No. 48, under his deeds, and occupied it until after he was bound up, as before stated, when he left the state. The defendant further admitted, that at the commencement of plaintiff's suit and before, he was in the possession of the whole of lot No. 48, claiming the whole; that plaintiff demanded the possession of the portion set off on his execution as aforesaid, but that he refused to surrender the same. The plaintiff admitted, that the execution in favor of the *State Treasurer v. Dow, Howe & others*, as before stated, was paid and satisfied, together with proper costs of collection, by Mr. Stoddard.

The County Court, May Term, 1852,—POLAND, J., presiding,—upon this evidence, rendered judgment for the plaintiff, to recover the possession of so much of lot No. 48, as was set off on his execution against Benjamin Dow, as aforesaid.

Exceptions by defendant.

J. D. Stoddard for defendant.

1. We contend, that Benjamin Dow, at the time of the plaintiff's attachment, had no interest in the lot subject to the levy.

The fee and right of possession had passed to the mortgagees, by a forfeiture of the recognizance. *Pierce v. Brown*, 24 Vt. 165. *Paine v. Webster*, 1 Vt. 101. The right of Alden Dow, by his levy, and those claiming under him had absolutely vested by the lapse of time and thereby Benjamin Dow's interest was wholly extinguished. Comp. Stat. Chap. 45 § 20, 26, 28.

Chancering the recognizance was an exercise of judicial discretion, in favor of the sureties only, (Comp. Stat. Chap. 28 § 71,) and had no tendency whatever, as we can perceive to remove and lessen the interest of the mortgagees.

It is a principle well sustained by authority, that the mortgagor,

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after condition broken cannot regain his estate, but by a reconveyance, judgment at law, or a decree in equity. *Perkins v. Potts*, 4 Mass. 125. *Perry v. Prentiss*, 1 Mass 68. *Darling v. Chapman et al.*, 14 Mass. 101.

We are to note, the conditions of the mortgage are obligations of indemnity ; these are forfeited.

The plaintiff's levy states the lot to be worth four hundred and fifty dollars, and the existing incumbrances by the mortgage and a previous levy to be three hundred and fifty dollars. How was the precise amount of these incumbrances determined? Could the appraisers anticipate the precise measure of a decree in equity, that should embrace money paid, witnesses fees, personal expenses and counsel fees? If they could not, the levy would be void for uncertainty.

R. C. Benton for plaintiff.

Insisted, that the defendant is but a tenant in common with the said Benjamin Dow, or with such as have legally acquired title to the premises from or under him. That the officer was therefore bound to levy upon an undivided portion of the whole of said lot, and of course to an undivided fractional portion of every part thereof, and also on such proportional part, as the amount of the execution and costs have to the value of the whole premises. *Galusha v. Sinclear*, 8 Vt. 394. *Smith v. Benson*, 9 Vt. 188. *Swift v. Deane et al.*, 11 Vt. 323. *Eastman v. Curtis*, 4 Vt. 616.

If the proceedings of the officer have been either irregular or informal, they are cured by lapse of time, and are conclusive. Rev. Stat. 244 § 46. *Swift v. Cobb*, 10 Vt. 282. *Bell v. Roberts*, 13 Vt. 582.

Under the circumstances, it is difficult to perceive what principle, at law or in equity, can be urged to justify the defendant's claim, here set up to the whole of lot No. 48.

What if Benjamin Dow's case had been continued from term to term, and until long after his right of redemption had expired in that part of his farm set off to Alden Dow? Would not his mortgage to said Howe and others, have remained good and valid? Most certainly it would. How then can the defendant claim to have acquired title to the whole lot at the expiration of said time of redemption? The appearance of said Dow, at any term of

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court while the case was on the docket would have discharged his mortgage in effect if not in fact. Has either Alden Dow or any person under him acquired title to the whole of lot No. 48, by virtue of his set off? We think not, nor have they by any means even acquired title to Benjamin Dow's interest in said lot, which became incumbered and reverted to him by the act of court at the May Term, 1847.

It is by virtue of this reversion of said Benjamin Dow's interest to himself, under said act of court, that we claim a right to acquire and hold 51-450ths or undivided parts of said lot No. 48. By one levy upon said interest, we claim a right to be tenants in common with the defendant and others, of said lot No. 48, acknowledging ourselves with him and them subject to the operations of Benjamin Dow's mortgage to Stephen Howe and others.

The opinion of the court was delivered by

REDFIELD, Ch. J. This is an action of ejectment, wherein the plaintiff seeks to recover, as tenant in common with the defendant, *fifty-one* four hundred and fiftieths parts of certain premises, on the ground of the defendant's refusal to recognize his rights as co-tenant.

The parties both claim under Benjamin Dow, who first mortgaged the premises to Howe, Morse, and Putnam, to secure them for entering into a recognizance for his appearance at court, in a criminal case, which became forfeited May Term, 1846, the mortgage being dated May 23, 1846. In February (8,) 1847, Alden Dow levied upon the whole of Benjamin Dow's equity of redemption, treating the mortgage, as an incumbrance, to the full amount of the recognizance \$250, May Term, 1847, (and before the six months for the debtor to redeem the execution expires,) the recognizance is chancered to \$100, and costs some \$14; on the 22d of November, 1849, the plaintiff levies upon an undivided portion of the premises, the same, which the whole amount of the execution bore to the whole value of the premises.

March 29, 1847, Alden Dow conveyed his interest to J. D. Stoddard, and May 1, 1847, Stoddard conveyed to the defendant. I take no notice of O. Dow's deed, as agent of Benjamin Dow, as no power is shown, giving her authority to execute such deed. Mr. Stoddard paid the amount recovered on the recognizance,

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December 27, 1847 ; but whether on his own behalf, having then acquired the title of Alden Dow, or on behalf of the mortgagees, does not appear. And it is not perhaps important, as, if he paid it on his own behalf, he would still, in equity, be entitled to stand upon the mortgage, as a title, paramount to that of the mortgagor, or any one acquiring title, from or under him, subsequent to the execution of the mortgage. For so long as the mortgage title exists, to any amount, and it must exist till it is all paid, either by the mortgagor, or some one in his behalf, that title must be superior to any title derived from, or under the mortgagor, at a subsequent date.

The mortgage title then, to the amount of the \$114, and interest, being still subsisting, either in the original mortgages, or in Stoddard, or his grantees, who have paid it off for their own protection, it must surmount, and override, any title which plaintiff could possibly obtain of Benjamin Dow, of a date posterior to the title by the mortgage, which is now vested in the defendant, and which will effectually preclude the plaintiff from recovering in ejectment, against the defendant.

What is the precise nature of the title acquired by the plaintiff, it is perhaps not needful to inquire. If his levy is correct and perhaps it is, he certainly has some rights, which will enable him to go into a court of equity, and obtain title to the premises ; either upon paying the mortgage, as tenant in common with the defendant, under Alden Dow's levy, or by paying both the mortgage and the execution and fees, to have the whole title in the premises quieted in him.

It is in vain to urge, that if a mortgage, under such circumstances, is paid off by the mortgagor, or defeated, in a judicial procedure, on the ground of illegality, or any other ground, this leaves the whole title, in the creditor, who has levied upon the equity of redemption, and that this title is perfect, both in law and equity. There can be no doubt the mortgagor, under such circumstances, has an equity, which he can successfully assert, in a court of equity. Whether he may claim strictly, at law, to stand as a tenant in common, with levying creditors, in the proportion, which the mortgage, at the time of the levy, bore to the amount of the execution, is perhaps questionable. That is certainly the simplest view of the case, and it brings the thing to the same result, as if the levy

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had been made upon land unincumbered, except in one case the levy is in severalty, and in the other, in common.

But here the mortgage is not extinguished. For if paid by defendant, or his grantors, the law will not create a merger, contrary to their probable purchase in buying in, or advancing the amount of the mortgage, and the equity of the case, so that as the facts now stand, the plaintiff's title is clearly subordinate to that of the defendant, which must defeat his recovery at law.

Judgment reversed, and plaintiff became non-suit.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT
FOR THE
FIRST JUDICIAL CIRCUIT.
SEPTEMBER TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

WILLS & FAIRBANKS v. RUSSELL B. JUDD.

Assumpsit. Witness. Inferences of fact, &c.

If one of several plaintiffs be called as a witness by the defendant, and be released from all interest, and willing to testify, he is a competent witness, although his co-plaintiffs, and others interested on the same side, may object.

To remove the interest of a witness who is interested in the event of the suit, he must not only be released from all liability for costs, but also from all liability for the money recovered, and from the claim, in discharge of which, any part of the money recovered in the suit would go.

Upon the report of an auditor or referee, all inferences of fact are to be made by

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the court, to which the report is returnable, and after such court have rendered judgment upon the report, if their judgment can fairly be sustained, by any inference of fact they might have drawn from the report, this court, as a court of error will presume they based the judgment upon such inference.

ASSUMPSIT. The declaration contained the common counts, for work and labor ; for goods, wares, and merchandize ; for money lent, advanced, paid, &c ; and for money had and received, &c. Plea, the general issue and notice.

The case was referred, under a rule of court, to a referee, who reported substantially the following facts :

That the plaintiffs commenced business in co-partnership, as merchants, in April, 1845, and continued in business till September 29, 1851, when they failed in business, assigned all their merchandize and all their book accounts, except the account of the firm against the plaintiff, Wills, to Lucius H. Barber for a valuable consideration.

That from the commencement of said partnership until the close, the defendant was at work for the plaintiff, Wills, in his individual business as a carpenter, and during the same period purchased goods, and had an account at the plaintiffs' store, which account was put into a pass-book, kept by the defendant ; and that at the end of each six months, the balance of account against the defendant was charged to the account of the plaintiff, Wills, and credited to the defendant. That these settlements were so made up to the 29th of September, 1849, but from September 29, 1849, to the 29th of September, 1851, the time of the plaintiffs' failure, no transfer was made of the defendant's account to the account of Wills.

That the partnership books and store were under the charge of the plaintiff, Fairbanks, and no settlement was made between the plaintiffs and the defendant, except the semi-annual transfers to Wills, as aforesaid, nor was the defendant called upon for payment until after the failure of the plaintiffs.

That on the 30th day of September, 1851, the plaintiff, Wills, executed to the defendant a mortgage conditioned for the payment of the account of the defendant. That some time during the winter of 1853, the account of the plaintiffs was assigned, by the said Barber to one Truman Huling, as collateral security for money loaned Barber ; and that on the third day of October, 1853, said

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Barber assigned to said Huling, the account against the defendant.

The referee also reported, that it appeared from the testimony of the plaintiff, Wills, who was willing to testify for, and was offered as a witness, by the defendant, and objected to by the nominal party, Fairbanks, and by Huling, the party in interest, that in April, 1845, when the defendant commenced trading with the plaintiffs, it was verbally agreed between both the plaintiffs and the defendant, that whatever account the defendant should run up at the plaintiffs' store, the plaintiff, Wills should pay the firm; and that as matter of convenience it was to be charged to defendant for six months, and at the end of every six months, it should be charged to Wills, and credited to the defendant. That the account of defendant for carpenter work was from time to time looked over between them, and compared with the store account on the pass-book, and that at the time of the failure, there was due from Wills to defendant, a balance for his labor, over and above the whole store account, and that to secure this balance, and certain claims, defendant had against Wills, the said mortgage was executed; but that no final settlement had been made between them.

That before testifying, the defendant executed to Wills, a full discharge. That plaintiffs offered the said Barber as a witness, but before he testified, T. Huling and A. M. Huling, his attorneys, executed the following release to him, viz: "For value received of "Lucius H. Barber, we hereby release and discharge him from all "liabilities to us or each of us for costs, fees, and disbursements in "the suit, Wills & Fairbanks against Russell B. Judd, now pending in the Bennington County Court, and from all future liability "to us of costs, fees, and disbursements in and about said suit."

That defendant objected to the testimony of said Barber on the ground of interest. That it appeared from his testimony, that after the assignment of the accounts of the plaintiffs, and notice thereof to him, and before the transfer to said Huling, that the defendant promised to pay the account in controversy to him.

The referee submitted that if the court should be of the opinion that Wills was an incompetent witness, then he found due to the plaintiffs \$——. But if otherwise, then he found nothing due, unless the court should be of opinion that said Barber was a competent

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witness, and that a promise of the defendant to pay him as assignee, the account apparently due upon plaintiffs' book operated as an *estoppel in pais* upon the defendant, then he found due the plaintiffs \$——.

The County Court, December Term, 1853,—PIERPOINT, J., presiding,—upon the facts reported, decided that the plaintiffs were not entitled to recover.

Exceptions by plaintiffs.

O. L. Shafter and A. M. Huling for plaintiffs.

I. Wills was improperly admitted as a witness. He could not testify without the consent of Huling, the party in interest. *Sargeant v. Sargeant*, 18 Vt. 372. *Hackett v. Martin*, 8 Greenl. 77. 20 Johns. 142. 1 Cowen & Hill's notes 123. 1 Greenl. Ev. § 353.

II. The testimony of Barber was properly received, he having assigned absolutely to Huling, and having been released by his attorneys from all liability for costs, fees and disbursements. *Boardman v. Roger et al.*, 17 Vt. 589. *Blake v. Buchanan*, 22 Vt. 548. 9 Wend. 293.

III. The absolute assignment to Barber, for a valuable consideration, and notice to Judd, and the promise by him to pay the account to Barber, estopped the defendant from saying that he was not indebted to the plaintiffs. *Cummings et al. v. Fuller*, 13 Vt. 434. *Blake v. Buchanan*, 22 Vt. 548. *Stiles v. Farrar*, 18 Vt. 446. *King v. Fowler*, 16 Mass. 398. *Henry v. Brown*, 19 Johns. 49.

The promise was not *nudum pactum*. 1 Vt. 57. 10 Mass. 319. 12 Mass. 288. 13 Mass. 292. 15 Mass. 387. *Bucklin v. Ward*, 7 Vt. 195.

The silence of the debtor even, will estop him, as to offsets existing at the date of the notice. *Merrill v. Merrill*, 3 Greenl. 463. *King v. Fowler*, 16 Mass. 397.

And the promise will estop the debtor, even if the assignment was as collateral security for an existing debt. *Blake v. Buchanan*, 22 Vt. 548. *Blin v. Pierce*, 20 Vt. 29.

There was an *account* against the defendant on the books of the plaintiffs; defendant not only knew this, but was himself party and privy to its being there. Whether the defendant owed the account is quite immaterial, so long as he recognized its validity

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and promised to pay it. *Walbridge v. Harroon*, 18 Vt. 448. *Warren v. Bishop*, 22 Vt. 614. 1 Greenl. Ev. § 270.

It is not essential to the estoppel, that Barber should have made the purchase, on the faith of the promise, it is sufficient that he retained the account on the faith of the promise. *Sargeant v. Sargeant*, 18 Vt. 377.

IV. Huling can claim the benefit of this estoppel. 1 Story's Eq. Com. § 409, 410. *Porter v. Rayworth*, 18 East. 417. 8 Wend. 600. 9 Wend. 293.

J. L. Stark for defendant.

The first question presented by the report is, whether Wills is a competent witness, when called by the defendant, and consented to be sworn and testify.

I. It is well settled in this state, that it is no objection to the competency of a witness, that he is a party to the record, either where he has no interest in the event of a suit, or is called to testify against his interest. *Sargeant v. Sargeant*, 18 Vt. 376. *Paine v. Tilden*, 20 Vt. 576. *Johnson v. Blackmer*, 11 Conn. 342. *Westcott v. Woodruff*, 12 Conn. 138. 20 Com. Law 47.

If Wills had an interest in the event of the suit, before his release, it was balanced. If Judd recovered he would have to account to his partner, and if the assignee recovered, he might have to account to Judd.

The report shows that the defendant never was the debtor of the firm.

It is the contract that creates the relation of debtor and creditor, and not the charge. 8 Vt. 185. 10 Vt. 201.

The report also shows, that the goods have been paid for to Wills, by the defendant, agreeably to the contract, before the failure and assignment. This was a discharge of the debt. *Fay et al. v. Green*, 1 Aik. 72. *Strong v. Fisk*, 13 Vt. 278. *Eaton v. Whitcomb*, 17 Vt. 646.

The report finds that nothing is due the plaintiffs, unless the court be of the opinion that Barber was a competent witness, and that the promise to pay an account apparently due upon the plaintiffs' books operated as an estoppel in pais.

1. Barber being in interest was not a competent witness.

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2. This debt, by the contract between the parties, was a part of the Wills account, and not assigned.

3. The payment to Wills, by the defendant was a discharge of the debt, and rendered it *functus officio*. *Walbridge v. Harroon*, 18 Vt. 448. *Dupoy v. Sweat*, 3 Wend. 140. *Barker v. Wheaton*, 5 Mass. 509. 4 Wend. 420.

In all cases where a debt has been discharged, and a new promise is relied upon, the action must be brought in the name of the person to whom the promise is made, and upon consideration.

The promise as proven, does not operate as an *estoppel in pais*. 1 Saund. Pl. & Ev. 65. *Brown v. Wheeler*, 17 Conn. 345. *Kinney v. Farnsworth*, 17 Conn. 355. *Roe v. Jerome*, 18 Conn. 153. *Middletown Bank*, 18 Conn. 44. *Cowles v. Bacon*, 21 Conn. 463. *Walbridge v. Kibbee*, 20 Vt., 543.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. That the plaintiff, Wills, was a competent witness, being fully released from all interest, and willing to give testimony, there can be no doubt. Notwithstanding any objection from others, who were interested in the suit, on the part of the party called, as a witness. This very point was decided, by this court, many years since, in the county of Caledonia, in the case of *Silver, Pierce & Co. v. Lyman et al.*, which has since repeatedly been acted upon, in this court, and oftener, at the jury trials, in the county court, and which did not fail of being reported, as it is understood, from any doubt of its perfect soundness. *Miner v. Downer*, 20 Vt. 461, is to the same effect.

II. The first assignee of the claim, Barber, would have been a competent witness, if released from all obligation to refund the money, borrowed of Huling, and for the security of which this demand had been assigned. But he does not seem to have been released, from this obligation by Huling, but only from the cost of this suit. And so long as he remained liable for the money borrowed, and in discharge of which any money recovered in this suit would go, we do not see how he could be regarded as altogether divested of interest. It is probable Huling might rely chiefly upon the claim against defendant, but I notice nothing to preclude him from going against Barber, for the money loaned,

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even after an absolute conveyance of all Barber's interest in this claim, to him, unless he had stipulated to release Barber.

III. But it does not appear with sufficient distinctness, to justify this court, in finding error, that the promise, which Barber testifies to, was upon any consideration, or relied upon, by him. All presumptions must now be in favor of the judgment below. And it does not clearly appear, that Barber had an interest to the full extent of the property assigned, or that he might not in fact have been a mere trustee and holding for the benefit of creditors, for the assignment might still have been upon valuable consideration. And certainly there is no pretence, that Barber acquired any more right to recover upon this account than the plaintiffs had, unless he was misled, by defendant's promise. This could not have induced the original assignment, as it seems to have been altogether subsequent to the assignment. And there is nothing in the case to show, even probably, that Barber relied upon this promise, after it was made, and was thereby misled, so that upon both grounds, the case fails to show error in the judgment of the county court. There is undoubtedly enough in the testimony of Barber, if admissible, to ordinarily justify a jury in finding for the plaintiff. But upon a report of auditors, and especially of a referee, all inferences of fact are to be made, and can only be made, by the court, to which the report is returnable, and after such court have rendered judgment, upon the report, if their judgment can fairly be sustained, by any inference of fact they might have drawn from the report, it is the duty of a court of error to presume they based the judgment upon such inference. *Walbridge v. Kibbee*, 20 Vt. 543, and *Foot v. Ketchum*, 15 Vt. 258, go to show where the maker of a promissory note assigned, promises the holder to pay it to him, under a mistake of the facts and the rights of the holder, he is not bound by such promise, until the other party has so far acted upon it, as not to be in a situation of being able to be put in *statuo quo*, nothing of which appears in the present case, and we may well presume, as we are bound to do, that the county court found the contrary fact, and based their judgment upon it.

Judgment affirmed.

NOTE.—There are certainly some facts stated in the report, which would lead

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one very strongly to question the entire reasonableness or justice of compelling defendant to pay this account, unless a case was very clearly made out against him. He seems never to have been indebted to the plaintiffs, but merely to have received the articles charged in payment for his labor, with the full consent of both plaintiffs. The plaintiffs had failed, and in their assignment had reserved their claim against Wills, to whom these articles were properly chargeable, having been entered as delivered to defendant. If then the *books had been completed*, these articles would have stood charged to Wills, in the *very account* excepted from the assignment. Under these circumstances any tribunal must be very credulous to believe, that defendant understandingly promised to *pay*. The most which could be supposed rational, would be that he promised to see it adjusted; at all events, we think the county court fully justified in requiring the plaintiffs to make out a clear case of fraud intentionally practiced by defendant, either upon Barber or his assignees, before they would subject him to a second payment for these articles. We allude to these considerations, as affording an ample justification for the judgment.

JAMES PORTER v. JIRAH VAUGHN AND REUBEN R. THRALL.

[IN CHANCERY.]

Effect of Decree of dismissal, when orator fails to appear and further prosecute. Disaffirmance of contract to convey, and resuming possession of premises; its effect on the note given for the premises, &c.

Where a bill in chancery is dismissed with costs, for the want of an appearance and prosecution by the orator, and not on its merits, the decree dismissing the bill will not operate as a bar to a suit founded upon the same matters, but under such circumstances, the dismissal of the bill will be the same as a non-suit at law.

Where A. executes his note to B., for a given sum payable at a future day with interest annually, and for this note B. agrees in writing, if the same is paid when due, to convey the premises, for which the note was given, and A. goes into possession of the premises, under a lease, therein agreeing to pay a stipulated rent, if the note is not paid when it falls due according to its tenor, and A. continues in possession under the contract and lease, and the note is not paid when due; if B. then elects to treat the contract as abandoned, and instead of enforcing the payment of the note, resumes the possession of the premises, and permits A. to remain under a lease, in which he reserves rent to himself, thus establishing the relation of landlord and tenant between himself and A., and

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this by their mutual arrangement; it will operate as a disaffirmance of the contract on the part of B., and a resumption of the premises in his own right, and the note must be regarded and treated as paid when B. thus takes possession of the premises as his own; and after this B. can no more enforce the collection of the note against A., than if he had brought ejectment to recover possession of the premises, upon the neglect of A. to pay the note as stipulated, and had obtained possession of the premises thereby.

Nor can B., after thus resuming the possession of the premises, and reserving rent to himself, enforce the collection of interest on such note.

APPEAL from the court of chancery.

The facts, upon which the principal questions arising in this case were decided, sufficiently appear in the opinion of the court.

S. H. Hodges for orator.

P. T. Washburn for defendants.

The opinion of the court was delivered by

ISHAM, J. The former decree in chancery, which is relied upon as a bar to this suit, was in many, if not in all essential respects, founded upon the same matters which are embraced in this. Whether the same relief could have been obtained in that case, as under this bill, we are not called upon to determine, as we are satisfied, that in any event, the decree in that case is no bar to this prosecution. From the record of that case, it appears, that testimony had been taken, and the case set down for hearing, and when called for trial, the plaintiff declined to have the case heard, or to proceed in the further prosecution of it; and thereupon the case was dismissed by the chancellor, with costs. That decree was not intended as a dismissal of the bill on its merits; as is evident from the fact, that the original decree was amended by the chancellor, and the amendment sustained by this court in the 22d Vt. 269, so as to rebut such a conclusion even by implication. We are to regard that decree, therefore, as containing on its face, the order that the bill be dismissed with costs, *for the want of an appearance and prosecution by the orator*. Under such circumstances, the dismissal of a bill will be the same as a non-suit at law, and will be no bar to a subsequent bill for the same matter. In Welford's Eq. Plea. 356, it is said "that an order for dismissal is no bar, unless

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“it determines that the plaintiff is not entitled to the relief sought; “therefore, an order *dismissing the bill for want of prosecution* is no “bar.” The same rule, and in the same language, is given in Mitf. Plea. 196. In *Brandyne v. Ord*, 1 Atk. R. 571, Ld. HARDWICK ruled, “that where the defendant pleaded a former suit, that the “court implied there was no title when they dismissed the bill, is “not sufficient, they must show it was *res judicata* or *absolute determination* in the court that the plaintiff had no title.” The case of *Byrne v. Fryer*, 2 Molloy 157. 12 Eng. Cond. Ch. R. 403, was decided in the Irish court of chancery, and it seems to have been there considered, that a dismissal of a bill after publication passed, was not a dismissal for want of prosecution, and that such a decree, made in that stage of the case, was equivalent to an adjudication of the case on its merits. But in the case of *Curtis v. Lloyd*, 4 Myline & Craig. 194. 18 Eng. Cond. Ch. R. 194, which was decided in the English court of chancery, about ten years after that of *Byrne v. Fryer*, Ld. COTTENHAM, chancellor ruled, that after publication, and after the case had been set down and called for hearing, the common order for dismissing the bill would be granted. In such cases, the order is the same as a non-suit at law, and will be no bar to a subsequent bill for the same matter. The chancellor also recognized and confirmed the decision of Lord HARDWICK in the case of *Carrington v. Halley*, 1 Dickins 280, where it was held, “that even after a decree directing an issue, the plaintiff might still move to dismiss his bill, for “until the issue had been tried there was no determination.” The rule, we apprehend is this, that a *defendant* cannot move to dismiss a bill after publication is completely past. *Skip v. Warma*, 3 Atk. 558. 2 Daniels’ Ch. Pr. 355. But a *plaintiff* may in any stage of the cause apply to dismiss his bill upon payment of costs, even after issue has been formed or directed; but not after a decree. 2 Madd. Ch. 389, *Lock v. Nash*, note (y.) The same doctrine is sustained in this country. In the case of *Rope v. Rust*, 4 Johns. Ch. 300, Chancellor KENT ruled, “that where a cause “was set down for hearing on bill and answer, and the bill was dismissed with costs, *because no one appeared to prosecute*, and the “decree of dismissal was duly enrolled, that the decree was no “bar to a subsequent bill for the same matter.” In the case of *Sea Insurance Co. v. Day*, 9 Paige 247, the chancellor remarked,

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“that it was a settled rule of the court, that the complainant may “dismiss his bill upon payment of costs, in any stage of the proceedings, before a decree has been made affecting the rights of “others.” In 3 Phil. Evid. notes by Cowen & Hill 916, it is said, “that the general dismissal of a bill may be pleaded in bar to a “subsequent bill for relief on the same subject matter; but mere “dismissal, however, *for want of prosecution*, is no more than a “non-suit at law.”

The order of dismissal in this case as amended, is as follows: “the said cause being called to be heard on its merits, the solicitor for the orator appeared and declined a hearing of said cause, and the said court thereupon did order and decree that said bill be dismissed.” It appears, therefore, on the face of the decree, that the decree of dismissal was made, for the want of prosecution; and from the authorities, we are satisfied, that its effect is simply that of a non-suit at law, and is no bar to the prosecution of this bill, even if it is brought for the same matter.

In the investigation of the merits of this case, it is proper to observe, that at a former hearing in this court, the decree of the chancellor was in all respects affirmed, except as to the note of \$600, given on the 16th of March, 1838, by James and Jirah Vaughn, to Mr. Thrall, payable on the 1st of April, 1839, with annual interest. A re-hearing on that matter was then ordered, to which, alone, our present investigation is to be confined. The validity of the assignment by Mr. Vaughn to Mr. Thrall of his claim against Dr. Porter, arising out of the purchase of “Vaughn’s Patent Balance,” as well as the existence of a lien on that assignment and claim, for the amount due Mr. Thrall, from Mr. Vaughn, on the 29th of March, 1838, must be considered as settled by the decision of this court at that hearing. The chancellor allowed the sum of \$1,127,66, as being the balance due Mr. Thrall from Mr. Vaughn at that time, including interest to the time of making the report. In that amount was included the above mentioned note of \$600 and the interest. Whether that note and interest, was properly allowed, is the question in the case.

We have no doubt, that the settlement between Dr. Porter and Mr. Vaughn, on the 29th of March, 1838, was intended to be, and was in fact, a full settlement of all matters arising out of the purchase and sale of that Patent Balance. The disputable character

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of that claim, and the payment of \$350, by Dr. Porter, to Mr. Vaughn, was a sufficient consideration, to render effectual his discharge of that contract, and of the suit then pending upon it. That is the effect of the discharge as between them; though it is different as against Mr. Thrall, as he had obtained a previous assignment of the claim, of which Dr. Porter had notice. After that discharge was given, however, it was the duty of Mr. Vaughn to obtain that claim against Dr. Porter, and surrender it to him, as having been paid and satisfied in that discharge. As between them, it was the debt of Mr. Vaughn to pay to Mr. Thrall. Whatever sum Dr. Porter is compelled to pay, in discharge of the lien of Mr. Thrall on that claim, will be a payment by him, standing in the light of a surety for Mr. Vaughn. He would have a claim against Mr. Vaughn for the amount so paid, and would be entitled by subrogation to all the securities in the hands of Mr. Thrall for the payment of that amount. *Wilkes v. Harper*, 2 Barb. Ch. R. 353.

The note, which was allowed by the master, was given before the settlement between Dr. Porter and Mr. Vaughn, and under their contract, Mr. Thrall has a lien upon the claim against Dr. Porter, for its payment; and this lien still subsists, unless it has been removed by facts which appear in the report of the master as well as in the several answers of the defendants.

This note of \$600, was executed on the 16th of March, 1838, by Jirah and James Vaughn, and payable to Mr. Thrall on the 1st of April, 1839, with annual interest after it fell due. For this note, Mr. Thrall agreed in writing, *if the same was paid when due*, to convey to Jirah and James Vaughn, the shop and premises for which it was given. The Vaughns went into the immediate possession of the premises under a lease, therein agreeing to pay fifty dollars, per year as rent, if the note was not paid according to its tenor. These facts are distinctly stated in the answers of Mr. Thrall, and Mr. Vaughn, and are so found and stated in the report of the master. Mr. Thrall also further states, that the note was not paid, or any part of it, and that *since the 1st of April, 1839*, when the note fell due, and interest commenced running on the same, the Vaughns have continued in the use and possession of the premises under that contract and lease. Upon these facts, we think the note and the interest upon it, should not have been allowed by

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the master, or the decree of the chancellor. When this note was executed, the Vaughns went into the possession of these premises under a contract of purchase; they paid no rent for the same until after the note fell due, nor were they to pay interest. When the note fell due, Mr. Thrall was at liberty to adopt either of two courses. He could have treated the contract as still subsisting, and have enforced payment of the note; or have treated the non-payment of the note as an abandonment of the contract, and thereafter disaffirm any obligation on his part, to transfer the premises, or receive payment on the note. In this matter, his election has been made. He has treated the contract as abandoned; instead of enforcing the payment of the note, he has resumed the possession of the premises, permitting the Vaughns to remain in possession, not under their contract of purchase, but under a lease, in which rent is reserved to himself. From the time the lease took effect, after the note fell due, the relation of landlord and tenants existed between them. If Mr. Thrall, had brought ejectment to recover the possession of the premises, for their neglect to pay the note as stipulated, and had obtained possession of the premises thereby, no one would contend that payment of the note could afterwards have been enforced against the Vaughns. The same result has been produced in this case, by the mutual arrangement of the parties. The Vaughns have abandoned their possession under their contract of purchase, and have acknowledged the right and title of Mr. Thrall, as the owner of the premises, and themselves as his tenants. This must be deemed a disaffirmance of the contract on the part of Mr. Thrall, and a resumption of the premises in his own right; as much so, as if possession had been taken, after ejectment brought.

Under these circumstances, the case falls within the principle decided in the case of *Arbuckle v. Hawks*, 20 Vt. 588, in which the court observed, "That if the defendant chose to pursue the plaintiff for the price of the land, he should have done that; but when he takes possession of the land as owner, all claim upon the note is gone, and a contract once rescinded, cannot be restored, except by consent of both parties." The note, therefore, should not have been allowed as a subsisting claim, for the payment of which Mr. Thrall has a lien on the claim assigned to him

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against Dr. Porter. The note must be treated as paid, by Mr. Thrall's taking possession of the premises as owner.

The interest on the note, for other reasons also, should not have been allowed. If Mr. Thrall, after resuming the possession of the premises, is permitted to receive the rent, and also to collect the interest on this note, he will thereby obtain nearly twice the estimated annual value of the premises. If the note had not been satisfied by that arrangement, it is obvious, that Mr. Thrall's possession of the premises, and the reservation of rent to himself should at least have cancelled the interest.

The decree of the chancellor is erroneous, in directing a conveyance of these premises by Mr. Thrall, to Dr. Porter, *on his payment of that note*. Such should have been decreed, under those circumstances, if all the persons in interest, had been made parties to this bill. The \$600 note was executed by Jirah and James Vaughn, and the contract of Mr. Thrall was to convey the premises to them. James Vaughn has an equal interest with Jirah Vaughn in that contract; and as James Vaughn is not a party to this bill, no decree of that character could be made. The difficulty, that might otherwise exist in making a final decree in the case, is removed by the disallowance of the note and interest, from the report of the master.

The decree of the chancellor must be reversed, and the case remanded, for the purpose of deducting the amount of the \$600 note, and the interest which was allowed thereon, from the amount allowed and found due to Mr. Thrall. In other respects, the decree of the chancellor is affirmed.

JOHN ENNOS v. ERVIN PRATT.

Book Account. Jurisdiction. Award.

Where the parties had submitted verbally their accounts to arbitration, and the effect of the award and a note, given at the time, upon the whole account was in dispute, and the whole account, exceeding \$100, the plaintiff, to test the effect of the said award and note, upon the whole account, and to recover for an item of

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\$3,20 not passed upon by the arbitrator, brought his action in the county court —*Held*—that the county court, under this state of facts, clearly had jurisdiction, and that the plaintiff is entitled to recover the said item not passed upon by the arbitrator, though the award was held conclusive upon the matters passed upon by the arbitrator.

An award, on a parol submission, will be conclusive upon all the matters passed upon by the arbitrator, though the parties misapprehended the legal effect of the submission and award, unless it fairly appears, that the parties did not intend a submission and award, in the common sense of these terms.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported a balance due the plaintiff of \$51,20, subject to the opinion of the court, upon the following facts specially reported :

That all the accounts and dealings of the parties were closed on the 26th day of June, 1852 ; that both parties understood at this time, that the defendant was indebted to a considerable amount to the plaintiff ; but there was a disagreement between them as to the amount of the balance. That this difference was in regard to many items of the plaintiff's account against the defendant, which was for his work done and performed for the defendant, and both parties claimed to have kept the true account ; the plaintiff in his charges against the defendant, and the defendant by giving the plaintiff credit on his book. That the two accounts differed both as to the prices and the amount of the plaintiff's labor.

That the parties made several ineffectual attempts to settle their accounts and agree on a balance, and for that purpose examined each others accounts, several times, but failing to make a settlement, they agreed between themselves, that they would "leave it to one Ira Marks to make a settlement for them," and that the balance said Marks should find due to the plaintiff, the defendant should give his note for, payable to the plaintiff in one year, and that the plaintiff should receive such note.

That on the 29th day of June, 1852, which was the day, or the day after said agreement was made, the plaintiff and defendant called upon Marks, told him of their agreement, and the terms of it, and requested him to proceed and make a settlement of their accounts. That Marks consented to do so, but informed the parties, that his decision would not be binding, because their agreement was not in writing. That plaintiff, defendant, and Marks

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all supposed at the time, that the parties would not be bound, because they had not agreed to the submission in writing.

That Marks, as requested by the parties, proceeded to make an examination and settlement of the accounts. That the plaintiff did not have his account with him, before Marks, but defendant had his book, which contained not only his own account, but credits to the plaintiff, except a charge of plaintiff's for \$3,20 paid by one Lantry, which item was not brought to the notice of the said Marks. That Marks examined the accounts, heard the parties upon all the disputed items, and found due the plaintiff a balance of \$112, and wrote a note for that sum, which defendant signed, payable to the plaintiff or bearer, by the first of July then next. (That it was intended by said Marks and the parties that the note should be payable in one year from said first of July.)

That said note was handed to the plaintiff, who expressed great dissatisfaction at the finding of Marks, and wanted to know how he "got at it." That Marks explained the manner in which he adjusted the accounts. That the plaintiff was still dissatisfied at the finding, and laid down the note and said he would not take it; but said Marks told the plaintiff he thought he had better take the note, that it was as near the balance, as he, Marks, could get at it. That plaintiff took the note, still complaining of the decision, and claiming that there was more his due, and stated that he would apply the note on his account as far as it went, and would sue for the balance. That the note thus received by the plaintiff for \$112, was a short time after presented to the defendant for payment, and paid by the defendant.

The County Court, April Term, 1853,—PIERPOINT, J., presiding,—upon the facts thus reported, found that there was nothing due the plaintiff, and rendered judgment for defendant; the court also found from the report that the item of \$3,20 was not brought to the notice of Marks, but decided that this formed an item in a new account between the parties, and that the court had no jurisdiction to render judgment for the same in this action.

Exceptions by the plaintiff.

J. B. Bromley and D. Roberts for plaintiff.

I. There is in every valid submission to arbitration an agree-

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ment, either express or implied, that the parties shall *abide the award*. *Stewart v. Cass*, 16 Vt. 663.

In this case, the parties, both understanding that a parol submission did *not* bind them to abide the finding of Marks, chose that particular form of reference. This was announced to them by Marks as the law upon the matter being submitted to him; and so this consideration is an essential element in determining whether they *agreed* to abide the award.

The maxim *Indoratia juris, &c.* is limited as in *Brown v. Sawyer*, 1 Aik. 130, but here it has no application; for,

1. The maxim is founded upon the idea that men are in fact acquainted with the law, and contract with reference to it as it is; but here it is found as a fact that the parties misapprehended the law, and contracted with each other upon the basis of their misapprehension.

2. The misapprehension being mutual neither can claim any thing against the other upon that ground.

3. The law is the contract; and the contract is the mutual intent; and it would be extravagant to strain an artificial rule to the overriding of the mutual intent of the parties, and so create obligations which neither intended.

Again, the auditor has not found that the parties agreed to abide the award of Marks.

Marks then was but an adviser or conciliator; his office, as understood being rather to bring the parties together by a moral influence than bind them by legal coercion.

If Marks is to be treated as an arbitrator with the ordinary powers of an arbitrator then his award did not follow the submission; for he drew the note payable at an earlier time than that named in the agreement.

II. The circumstances attending the receipt of the note show clearly that plaintiff did not receive it as payment of his full account, and that his receipt of it was no recognition of the finding of Marks as an award. *Miller v. Holden*, 18 Vt. 337.

They show more than this,—the plaintiff receiving the note under an express reservation of his claim to the balance, and the defendant not objecting, his assent to the condition is to be implied. *Gassett v. Andover*, 21 Vt. 342.

The defendant himself, therefore did not recognize the finding of

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Marks as an award of an arbitrator. His payment of the note upon presentation shows the same thing.

If therefore we could call this under any circumstances a binding award, the matter was thrown open by the mutual action of the parties in respect to the note.

III. The item of \$3,20, "was not brought to the notice of, or adjudicated upon, by Marks." It was not then barred by his award. *Roue v. Farmer*; *Golightly v. Jellicoe*, 4 T. R. 146. *Buck v. Buck*, 2 Vt. 417.

Even a judgment bars only what is adjudged. *Seddon v. Futopt*, 6 T. R. 607. *Briggs v. Brewster*, 23 Vt. 100.

The same in book account,—*McLaughlin v. Hill*, 6 Vt. 20. BENNETT, J., in *Nichols v. Scott*, 12 Vt. 50. It is said in *Hodges v. Hosford*, 17 Vt. 615, that a settlement of book accounts is as conclusive as a judgment. And yet in settlement of accounts and receipts in full executed, items not actually considered and adjusted in the settlement are recoverable by action. *Nichols v. Scott*, 12 Vt. 47.

It would seem absurd to give greater force to this "settlement for them," made by Marks, than would belong to a settlement made by the parties without the aid of Marks.

IV. But the county court did not regard this item as barred by the award, but as an item in a new account, and so not within the original jurisdiction of the county court.

But the debit side of the plaintiff's book determines the jurisdiction, and this is to be determined by inspection. *Stone v. Winslow*, 7 Vt. 338. *Nichols v. Packard*, 16 Vt. 91.

The plaintiff had the right to test the validity of Mark's award before some court. As the note was not applicable as payment of any specified items, he must present his whole account; but this is beyond a justice's jurisdiction.

When therefore he sues in the county court, he sues in the only court which has apparent jurisdiction. To deny jurisdiction then, involves the error that the jurisdiction is dependent upon evidence as to the justice of the claims, as present subsisting demands, rather than upon the amount of them as claims; and involves the absurdity of requiring the plaintiff to give up his claims without a trial.

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F. Potter and Edgerton & Allen for defendant.

The acceptance of the defendant's note by the plaintiff was in pursuance of a previous agreement of the parties, that the same should be in full of the plaintiff's account, and a final settlement between the parties, and the statement made by the plaintiff "that he would apply the note as far as it went," &c., was made after he had received the note. Such a state of facts, amounts to a satisfaction and discharge of the plaintiff's account. *McGlynn v. Billings*, 16 Vt. 329. *McDaniels v. Lapham*, 21 Vt. 222. *Russell v. Hawkins*, 23 Vt. 561.

The report finds, that the plaintiff's account was for his work and labor. The item of \$3,20, for so much paid by Lantry is to be presumed to be work performed by Lantry while supplying plaintiff's place, and the whole account being of a particular character was barred by the proceeding before Marks, even if every item was not presented before him. *Briggs v. Brewster*, 23 Vt. 100.

The presumption is that the item was adjudicated by Marks in the gross item for four months labor, which appears in the plaintiff's account, though not presented before Marks as a distinct item.

The auditor did not find as a fact, that the item was not adjudicated by Marks, but only that it was not on the defendant's book, and that it was not proved to him that it was so adjudicated.

But the county court had not jurisdiction of the item; an account which is barred by a settlement, a judgment, or an award, is not available for the purpose of giving jurisdiction. *Gilson v. Sumner*, 6 Vt. 163. *Spear v. Peck*, 15 Vt. 566.

An omitted item forms an item in a new account. 5 Vt. 91. 13 Vt. 191. 5 Vt. 451. 11 Vt. 214. 17 Vt. 615.

The opinion of the court was delivered by

REDFIELD, Ch. J. In regard to the charge not passed upon by the arbitrator, there can be no doubt of plaintiff's right to recover. And, as he wished to try the effect of the award and note upon the whole account, he must have brought an action, upon the whole account, which he could only do at the county court, so that most obviously that court had jurisdiction of the case, and the plaintiff is entitled to recover the \$3,20, in this action.

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In regard to the effect of the arbitration and the execution of the note and acceptance and collecting of it, by the plaintiff, there is perhaps more difficulty. The arbitration seems to have been an ordinary parol submission, in the first instance, and the parties were bound to know that the legal consequence would follow an award, that it would bar the matters discussed and determined.

It would scarcely be allowable to avoid the effect of an award of arbitrators, by showing that the parties did not know, that by law it was conclusive, upon the matters passed upon, by the arbitrator. And showing that they were told, and believed it would not be, is much the same thing, unless we can fairly say, that under the circumstances, the parties did not intend a submission, and award, in the common sense of these terms, but only to have the person, look over the accounts and help them settle.

In regard to the execution and delivery of the note and receiving payment of the same, it undoubtedly has a strong tendency to show that the parties acquiesced, in the award, as final. But taken alone, aside from the submission and award, it could scarcely amount to a conclusive settlement of the account. For the plaintiff protested, at the time, that he would not take the note, in full satisfaction of the balance due, but only as far as it went, and would sue for the balance. This part of the case must turn mainly, upon the effect of the submission and award, and the acquiescence of the parties, in its finality.

Our examination, and reflection upon this case, satisfies us, that the award should be held final, to the extent of the matters passed upon. It seems to have been an ordinary submission and award, with this difference only, that the arbitrator expressed an opinion when called upon to make the settlement, that it would not be conclusive upon the parties, unless the submission were reduced to writing. The parties nevertheless requested him to proceed, and determine the balance, and he did, and the auditor states, as an inference it would seem probable, that the parties supposed, after the advice of the arbitrator, that the award would not be legally binding upon them. There is nothing in the case tending to show that they did not agree to abide the settlement, but the contrary, for defendant was to give his note, for the balance, and plaintiff to accept it, which was indeed done, but finally under protest. There is nothing to raise any doubt, that until the award was made, both

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parties expected, and intended, to abide the award, supposing, to be sure, that the arbitrator knew the law, and that they were not *legally bound* to abide it.

The case seems to me, in principle, not very different from that of any other contract, where the party understandingly assumes, in terms, an obligation upon himself, but in a form, which he supposes, at the time, upon good advice, if you please, the law will not enforce. A case, which is quite supposable to occur; one agrees to purchase land, at a given price, and takes possession and proceeds to make valuable improvements both parties to the contract supposing the statute will not allow such contract to be enforced, not knowing that equity, after a substantial part performance, will enforce such contracts, but each relying upon the contract, and the good faith of the other party to perform it; could it be fairly argued that such a case differs from the ordinary case. Or, we may suppose that a party agrees to give more than personal property is fairly worth, not supposing he is bound by the stipulation. Or in receipting property, attached on meane process, a price is affixed in the receipt neither party supposing it to be conclusive, or in settling a controversy a note is given for the supposed balance, both parties believing the matter subject to farther revision. Shall such mistakes of the law affect the rights of the parties? It really seems to me they cannot, unless all mistakes of law are to avail the party in excuse, which is certainly not the law, upon the subject.

The best construction I have been able to give this portion of the case inclines me to believe, the award must be held conclusive, of all matters passed upon by the arbitrator, notwithstanding the misapprehension of the parties in regard to the law. This portion of the case is, I think, really decided, by that of *Howard v. Puffer*, 28 Vt. 365, where it is held, that it is no sufficient ground of setting aside an award, by a court of equity, that one of the parties, without any mistake, as to the facts, misapprehended one of the legal consequences of the award, and that, the most important of all its effects, to wit, settling the title of the land in dispute.

Judgment reversed, and judgment on report for \$3,20, and interest from the time of the report being made.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
SECOND JUDICIAL CIRCUIT.
SEPTEMBER TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, }
HON. MILO L. BENNETT, } ASSISTANT JUDGES.

TIMOTHY M. BROWN v. HENRY CARPENTER.

Nuisance. Furious Dogs.

A large and furious dog, accustomed to bite mankind, is a common nuisance. In an action to recover damages against a party killing him, the defendant need not prove that he was obliged to kill him in self-defense.

TRESPASS for killing the plaintiff's dog. The declaration is in common form.

The defendant filed a plea in bar, setting forth, that the said

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dog was, and for a long time had been fierce and dangerous, and that he had bitten defendant, and sundry other persons, that all this was known to the plaintiff, and to those he entrusted with the keeping of said dog, and that with this knowledge said dog was suffered to go at large ; wherefore the defendant killed said dog as he had good right to do.

Issue joined, and trial by jury.

On the trial, the defendant offered testimony tending to prove, that the dog at various times and on different occasions for some years before, and up to the time of his death, had growled and sprung upon different people to their great alarm, and that he had bitten and wounded several different persons, both at plaintiff's house and at other places in the presence of the plaintiff, and in the presence of his father whom the said dog accompanied from home ; that he had sprung upon and bitten the defendant at three different times, and that this was known to plaintiff, and to those in whose care the dog then was by plaintiff's permission ; that on the second occasion when bitten, defendant informed the plaintiff's father, with whom the dog then was, that if ever bitten by the dog again, he should kill him ; that a few days after, the said dog being again with plaintiff's father away from home, the said dog again sprung upon the defendant and bit and wounded him ; that on the evening of the same day, said dog accompanied plaintiff's servant about half a mile from plaintiff's house, when the defendant killed him.

The plaintiff then offered testimony tending to prove, that the dog had been provoked by the defendant, but had not bitten him, and that much of his jumping on people was mere sport. On the trial, plaintiff called and examined his father, Samuel Brown, as a witness ; and the defendant for the purpose of discrediting said witness offered and was allowed to prove, though objected by plaintiff, that witness, Samuel Brown, in speaking of the defendant, and of the killing of said dog, said that the defendant was an ugly ill-tempered bird, and if there was any law to punish him, he, said Samuel, would get it, if it cost \$1,000. To the admission of which testimony plaintiff excepted.

The County Court, September Term, 1853,—COLLAMER, J., presiding,—charged the jury that every dog not confined, or physically restrained is a dog at large, within the meaning of the de-

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fendant's plea, notwithstanding he is all the time in the presence of his master.

That a dog whose conduct to people is so violent as to occasion alarm for their personal safety, is a *fierce* dog, and that if the jury find this dog was thus fierce, and did unprovoked, bite and wound the defendant and others, so that the jury find that he was a dangerous animal to be at large, and especially if dangerous to the defendant, and that this was known to the owner, and the dog still left unconfined up to the time of his death, they would return a verdict for the defendant.

To so much of the charge of the court as decided what was being *at large*, and to so much as defines what is being *fierce*, the plaintiff excepted.

After verdict for the defendant, the plaintiff interposed his written motion for a judgment for plaintiff notwithstanding the verdict, which motion was overruled by the court; to which plaintiff excepted.

E. Kirkland for plaintiff.

I. The county court erred in admitting testimony to prove the declarations made by witness, Samuel Brown, because, 1. The witness should have been asked if he had not made such statements, with time, place, and person mentioned. Roscoe's Ev. 96.

2. The matter inquired about was irrelevant to the issue and it is well settled, that the party making such inquiry is bound by the answer of the witness and cannot contradict it. 7 East. 108. *Harris v. Tippet*, 2 Camp. 687.

II. The court erred in instructing the jury, that a dog not confined, or physically restrained, was a dog *at large*. We contend, that a dog by the side of the owner, or his servant, or so near to them as to be under the control, or command of the owner or his servant, is not a dog *at large*. *Commonwealth v. Dow*, 10 Met. 384.

III. The motion for judgment *non obstante veredicto* should prevail.

1. If a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to a judgment *non obstante veredicto*. *Lambert v. Taylor et al.*, 4

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Barn. & Cress. 138. *Staple v. Hayden*, 6 Mod. 10. *French v. Steele*, 14 Vt. 479.

2. This plea does not allege in substance a sufficient justification, and upon a bad justification, judgment shall be given by confession. *Morris v. Nugent*, 7 C. & P. 572. *Wells v. Wood*, 4 C. & P. 568. *Lacy v. Reynolds*, Cro. Eliz. 214. *Vere v. Cawdfr*, 11 East. 568.

3. This plea is not cured by verdict, for it is a statement of defective title or cause of action. 1 Chit. Pl. 681. 2 Saunders 809.

Keyes & Howe and *J. D. Bradley* for defendant.

I. The facts alleged in the plea and found true by the jury, constitute a justification for killing the dog.

Because, 1. The facts found, describe a nuisance which any person had a right to abate. *Putnam v. Payne*, 13 Johns. 312. *Credit v. Brown*, 10 Johns. 365. Cro. Jac. 45. *Hinckley v. Emerson*, 4 Cowen 351.

2. These facts show the act of killing was in self-defense.

The dog was fierce and dangerous and had theretofore bitten, &c. defendant and sundry other persons, "knowing which plaintiff allowed him to go at large."

To turn such an animal loose is to endanger all who meet him, and especially those against whom his ferocity is directed. *Leonard v. Wilkins*, 9 Johns. 233. *Wright v. Ramscott*, 1 Saund. 84.

That the killing was necessary is fairly inferable from the facts stated in the plea, and the omission to formerly aver the necessity is cured by verdict. 1 Chit. Pl. 673, *et seq.*

II. As to the charge of the judge. The defendant on two occasions had practical demonstration, that the dog was "at large."

III. The proof of Samuel Brown's bitter feelings towards the defendant was properly admitted. It was analogous to the cases of a quarrel between witness and party. *Pierce v. Gilson*, 9 Vt. 222.

The opinion of the court was delivered by

REDFIELD, Ch. J. We think that a ferocious and over-grown dog, known to the owner or keeper to be accustomed to bite mankind, is to be regarded as at large, within the common import of

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those terms, in a plea in bar, when he is so far free from restraint, as to be liable to do mischief to man or beast; and this, such a dog is always liable to do, when not physically restrained, in the language of the judge in the court below. His being in the presence of his keeper affords no safe assurance that his known propensities will not prevail over the restraints of authority. That is the case with men often, and always liable to be with ferocious animals, as is said by one judge. "I think sufficient caution has not been used; one who keeps a savage dog is bound to so secure it as to effectually prevent it doing mischief."

As to the sufficiency of the plea, it undoubtedly puts the defense upon the ground that such a dog is *hostis communis*, the common enemy, and may be killed by any one. It alleges, indeed, that this dog had bitten the plaintiff, but does not claim that he was killed in necessary self-defense, at the time; nor do we think this necessary, in regard to dogs accustomed to bite mankind. That seems to be the law, ordinarily, as to dogs accustomed to chase game or to bite cattle. (*Wells v. Head*, 4 Car. & P. 568; *Vere v. Lord Cawder*, 11 East. 568.) But it is said, in the elementary books, that in a free warren, which is where one has the exclusive right to keep game, one may kill a dog accustomed to chase the game there, although at the time, not in the act of chasing game. (*Wadhurst v. Domme*, Cro. Jac. 45.) But the English cases do not seem to me to justify the opinion that it is necessary to show, that the killing a huge, ferocious dog, known to the owner or keeper to be accustomed to bite mankind, can only be justified on the ground that it was done in immediate self-defense. In *Smith v. Pelah*, 2 Strange 1264, the chief justice ruled that the master is liable for all damage done by such a dog, who has once bitten a man, even though it happened by such person treading on the dog's toes; "for it was owing to his not hanging the dog in the first instance;" and, it is added, "the safety of the king's subjects ought not afterwards to be endangered." This certainly looks very much like making the dog a common nuisance, and so such a dog is classed by Mr. Starkie, (Ev. 2d. Vol. 735, *et seq.*) The language of TINDALL, Ch. J. in *Sarch v. Blackburn*, 4 Car. & P. 297, is similar; and BEST, Ch. J. in *Blackman v. Simmons*, 3 Car. & P. 138, lays it down as clear law, that one who keeps such a dangerous animal, knowing its habits, is clearly guilty of "an aggravated species of man-

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slaughter, if nothing more," if the animal should afterwards kill any one. And what is said by DENMAN, Ch. J., in *Morris v. Nugent*, (19 Com. Law R. 535,) is upon the ground of the form of the issue, rather than the rule of law. The New York cases clearly treat such an animal as an outlaw and a common nuisance, liable to destruction. (*Hinckley v. Emerson*, 4 Cowen 351; *Putnam v. Payne*, 13 Johns. 312.) And this is a doctrine which this court is willing to abide by.

For to say that such a dog is not the common annoyance and terror of a neighborhood, is to deny what every man knows to be emphatically true. Some animals are common nuisances, if suffered to go at large, from their known and uniform instincts and propensities, such as lions and bears, and probably wolves and wild-cats; (B. N. P. 76: *King v. Huggins*, 2 Ld. RAY 1588;) and domestic animals, from their ferocious and dangerous habits becoming known to their keepers, thus become common nuisances if not restrained. But such an animal is quite as obviously within the general definition of a common nuisance as a wolf or a wild-cat or a bear, and, if allowed to go at large, as really deserves to be destroyed. If any animal should be regarded as the common terror of all peaceable and quiet-loving citizens, it is such a dog; and the owner who persists in keeping such an animal, without effectually and physically restraining him, so that he can do no one harm, ought not to complain of his destruction. He ought to be grateful to escape so; for he undoubtedly is liable to, and justly deserves exemplary punishment, under the criminal laws of the state; and if one injured, or liable to injury, chooses to right himself by abating the nuisance only, he deserves to be regarded as a public benefactor.

Judgment affirmed.

Peeler v. Stebbins & Kenney.

BENJAMIN H. PEELER v. STEBBINS & KENNEY.

Trespass. Officer. Attachment of property in boxes, &c.

An officer has a right to take possession of boxes left at a depot for transportation, and open the same, and take on his attachment, any attachable articles therein.

But where boxes are so found at a depot, in which there is property exempt from attachment, the officer has no right to remove the same from the depot unnecessarily, and if the officer removes the boxes, and fails to show a necessity therefor, he is guilty of trespass.

TRESPASS for certain articles of personal property, described in the plaintiff's declaration.

Plea, not guilty and notice of special matter, and trial by jury.

On the trial the plaintiff gave evidence, tending to show, that his agent left at the railroad depot in Vernon, three boxes, containing the articles mentioned in the declaration, belonging to plaintiff, to be forwarded to the plaintiff in Illinois; that said boxes were taken by the defendants, and removed from said depot to a house about half a mile from said depot, and that no part of the same was returned to said depot, until near a month afterwards, and then a large number of said articles were missing.

The defendants read in evidence, two attachments, and two executions, in favor of said Stebbins against said Peeler, and the officer's returns thereon; and gave testimony tending to show that defendants, by virtue of said attachments, took said boxes from said depot, and removed them to a house about half a mile from said depot, and there, within two days, opened the same, and selected and retained on said attachments, and afterwards sold on execution the articles mentioned in the defendant's notice, and in said returns. That the day after making such selection, the defendants returned said boxes, containing the rest of their contents to said depot; but that the depot master refused to receive the same, and that the next day, the defendants carried said boxes, and deposited them in the corn-barn of the depot master, (Burrows,) near said depot, where the same remained three or four weeks, when, by the order of the mother of plaintiff's wife, they were forwarded by railroad to the plaintiff.

The plaintiff also gave evidence tending to show, that most or

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all the articles retained on said attachments, were articles of furniture and tools, exempt from attachment.

The defendants requested the court to charge the jury, that if said boxes contained any articles subject to attachment, the defendants were authorized by said attachments, to take and remove said boxes for the purpose of opening the same, and selecting and taking such articles.

The County Court, September Term, 1853,—COLLAMER, J., presiding, —charged the jury, among other things not excepted to, that the defendants were authorized to open said boxes, and take on said attachments any attachable articles therein; but they were not authorized to remove said boxes from said depot unnecessarily for that purpose, and if they did so, showing no necessity therefor, they were guilty of trespass, and the jury should give the plaintiff damage for what he suffered by such removal of the boxes, and also damage for any such articles actually retained by the defendants, which the jury found to be protected from said attachment by law, giving the jury full directions in relation thereto.

To that part of the charge of the court in relation to the removal of the boxes, the defendants excepted.

E. Kirkland and Stoughton & Baxter for defendants.

It is quite obvious that the boxes and some of their contents were attachable, and that no attachment could be made except by taking them into custody.

The original taking was legal, and the question arising on the exception is this: Did the officer after having the goods legally in his custody, become a trespasser *ab initio*, by carrying the boxes, with their contents, from the place where they were seized for the purpose of opening them, when he might, without inconvenience to himself, have opened them at the place of seizure? We contend that he did not.

In the case of *Lewis v. Whittemore*, 5 N. H. 364, it was held, that where goods of A. were intermixed with goods of B., and were taken by an officer upon a writ against B., that the officer could not be made a trespasser, and that he was not liable in any form, until A. had identified and demanded his goods.

The same principle was recognized in *Bond v. Ward*, 7 Mass. 123, and in *Shumway v. Butler*, 8 Pick. 448.

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In the case at bar the property consisted of articles attachable, and articles not attachable, and they were mixed and boxed up by the plaintiff to follow him beyond the reach of his creditors, at the first convenient opportunity.

The officer might certainly take a reasonable time to open the boxes and make a schedule of the property, and he might legally exercise his own judgment as to the place where he would store them until he could conveniently perform that duty.

J. D. Bradley for plaintiff.

The defendants claim by their exceptions either,

1. That the writ which would justify their taking *one* thing, justified their unnecessarily taking another thing, or else,
- 2. That the detention of the boxes and articles exempt from attachment, in the first place, *two* days, and afterwards three weeks, is *presumed by law* to be necessary.

We deny both these propositions.

The opinion of the court was delivered by

REDFIELD, Ch. J. The objection made, in this case, is only to the charge of the court, as to the removal of the boxes, and the goods not attached. As, then, the process was never attempted to be applied, to any of this property, no question of trespass, by means of abuse of the process to cover property, which the officer put to some other use, inconsistent with the purpose for which it was taken, properly arises.

The officer had the right to take possession of the boxes, and open them, and separate what he chose to attach, as an incident, so to speak, of the right to make the attachment of property so situated. But this he must do in a reasonable manner, and this is precisely what the court told the jury, in other words. "But they were not authorized to remove said boxes from said depot, unnecessarily," "And if they did, *showing no necessity therefor &c.*" It seems to us, this is putting the case upon the true ground. And if it became necessary or reasonable, for the defendants to do all that they did do, they should have shown the reasonableness of such acts to the jury, which comes clearly within the terms of the charge.

Judgment affirmed.

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GEORGE SLATE v. WILLIAM P. BARKER & OTHERS.

Attachment of personal property.

Where an officer who was in the possession of a room and had permitted W. to store certain personal property in the same, and writs were put into his hands against W., and the officer attached the property in said room, and resumed exclusive possession of the room, and fastened the outer door so as to cut off all public access to it, though he neglected to fasten an inner door leading to a wood room,—*Held*—that the attachment was valid and sufficient to perfect the officer's right to the property.

And if W. had a joint possession of the room with the officer, when under the authority of the process in his hands, the officer terminated that possession by fastening the outer door to the room, it constituted a legal attachment, under the authority of *Newton v. Adams*, 4 Vt. 487.

TRESPASS for 40 stoves and certain other articles of personal property.

The case was referred under rule of court, and the referee reported in substance, the following facts:

That the plaintiff, who was a deputy sheriff for the county of Windham, on the second day of January, 1851, received sundry writs of attachment against one Robert W. Wiley; and that by virtue thereof the plaintiff attached the 40 stoves named in the declaration as the property of said Wiley. That judgment was confessed upon the suits on the fourth day of February, 1851, and the executions put into plaintiff's hands the same day, who on the same day made return on said executions that he could find no property of the debtor whereon to levy the same. The referee found that plaintiff is holden to said creditors for the value of said stoves.

That the defendants a few hours after the plaintiff had attached said stoves, went with an officer and by virtue of sundry writs of attachment against said Wiley, took said stoves and disposed of the same in payment of the claims mentioned in said attachments.

That the plaintiff at the time of the attachment, and for a year or more before had occupied a room in a building leased by Henry & Pond, two of the defendants; and that plaintiff's occupation was exclusive of all others, although it appeared that Henry & Pond had occasionally stored a few articles in this room, which was used by the plaintiff as a store room, his place of business

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being in another room; there were two door ways to this room, one opening into a lane leading from the street, the other into a back room occupied by Henry & Pond, as a wood room. That the said Wiley was a stove dealer at Bellows Falls, and had his store or place of business on the east side of the street from the building in which plaintiff's said store room was; that a few months before the attachment by the plaintiff, said Wiley had hired the privilege of storing his stoves in said room of the plaintiff, and used to go as often as he pleased to said store room, passing up said lane and entering said room by the door opening into the lane as aforesaid.

That early in the morning of said second day of January, 1851, and before day light, the plaintiff with said writs went to said store room, and attached said stoves, forty in number, and marked the same by writing on them with chalk "attached," fastened the outside door with an iron hasp inside, as accustomed to fasten the same nights, but did not fasten the door opening into the room occupied by Henry & Pond, as a wood room; and about 6 o'clock in the morning plaintiff requested one Horton, who worked in said building for said Henry & Pond, to notify any one that came, that he had attached said stoves. That the plaintiff thus left the stoves, and returned them attached on said writs of attachment. That in a few hours after, the defendants came with an officer having sundry writs against said Wiley, and attached and moved the said forty stoves away; and afterwards in due course of law sold said stoves and appropriated the avails in payment of the claims mentioned in their said writs; that it also appeared that the officer and the defendants were informed of the attachment by the plaintiff before they moved away the stoves.

The County Court, September Term, 1853,—COLLAMER, J., presiding,—accepted the report of the referee, and rendered judgment thereon for the plaintiff.

Exceptions by defendants.

Stoughton & Baxter for defendants.

The question arising upon the report is, whether the attachment made by the plaintiff was valid as against the defendants.

The law is well settled, that in order to constitute a legal attachment the officer must so far have the possession of the property as

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"necessarily" to exclude acts of dominion over it by others; this may be done by the officer's taking and keeping actual possession of the property; by putting it into the custody of some one acting as his servant; or by locking up the property and retaining the key, neither of which was done in the present case. *Newton v. Adams et al.*, 4 Vt. 437. *Lyon v. Rood*, 12 Vt. 233.

The room where the stoves were stored was in the joint occupancy of the plaintiff and Wiley, and how the plaintiff might put an end to Wiley's occupancy does not appear; but it does appear that for some months before the attachment, Wiley had been in the occupancy of said room under contract to pay plaintiff for the use of the room. It was not merely hiring the plaintiff to store the stoves in his room; but it was hiring the storage with a right to go to said room as often as he pleased with his customers, and there selling and delivering such property as he kept there.

We think, that placing the writs in the plaintiff's hands was not sufficient of itself to constitute the attachment a valid one, he must in some way dispossess Wiley and place the property necessarily beyond his dominion, and that too in a manner to give notice to others of the plaintiff's custody. Property not in the actual custody of any one is in law in the custody of the owner. 7 Conn. 271.

Nothing was done to exclude said Wiley's dominion over the property. In the morning, he and all others found the same state of things as to the situation of the property as for months previous, and leaving it in Wiley's custody was an abandonment of his lien. *Pomeroy v. Kingsly*, 1 Tyler 294.

Suppose the officer learns in the street, that the property is under attachment, and he goes, as in this case, to learn the truth of the rumor, and finds it still in the debtor's possession, doors open as usual, the debtor and others the same means of access to it as usual. Now what does such a notice amount to? Certainly nothing which would render the first attachment *valid*, is valid without notice. Must the officer receiving such notice stand by and see the third officer who had not heard these rumors take the property upon other debts? We say not. *Young v. Walker*, 12 N. H. 502. *Gordon v. Jenney*, 16 Mass. 465.

D. & G. B. Kellogg for plaintiff.

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The only question raised upon the report of the referee is, whether the plaintiff's attachment is valid against subsequent attaching creditors.

We understand the main object to be accomplished in making an attachment, is to give notice to those interested.

In attaching real estate and certain personal property, the statute makes it sufficient notice to leave a copy in the town clerk's office.

To constitute a valid attachment, it is only necessary to exercise sufficient control over the property to give timely and unequivocal notice of the custody of the attaching officer. *Lyon v. Rood*, 12 Vt. 233. *Train v. Wellington*, 12 Mass. 495. *Denney v. Warren*, 16 Mass. 420. *Gordon v. Jenney*, 16 Mass. 465. *Newton v. Adams*, 4 Vt. 437. *Huntington v. Blaisdell*, 2 N. H. 317. *Bagley v. White*, 4 Pick. 895. *Fitch v. Rogers*, 7 Vt. 403. *Mills v. Camp*, 14 Conn. 220.

It is held sufficient if either the subsequent attaching creditor or officer knew of the prior attachment. *Gordon v. Jenney*, 16 Mass. 465. *Denney v. Warren*, 16 Mass. 420.

Here the plaintiff had and was entitled to the exclusive possession of the room in which the property was. He took measures to secure the same as well as he could, marked the property and left notice with Horton of his attachment.

That Horton opened the door of the office to his employers cannot effect the rights of the plaintiff. The plaintiff was not bound to protect the property against thieves and trespassers.

Taylor the second attaching officer had notice of the plaintiff's attachment before he attached the stoves, also some of the creditors who directed the attachment.

The opinion of the court was delivered by

ISHAM, J. The inquiry in this case arises upon the validity of the plaintiff's attachment. If that was legal, and has not been in any way abandoned or relinquished, the property was wrongfully taken by the defendants, and the plaintiff is entitled to recover its value. It is insisted that the plaintiff, after his attachment, neglected to take the property into his custody and possession, in a manner to exclude it from the possession of Wiley, and that, for

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that reason, it was lawfully taken by the defendants on their writs, as his property.

In the case of *Lyon v. Rood*, 12 Vt. 233, it was held, that "to constitute a valid and legal attachment, the officer must take and keep the custody and control of the property, either by himself or his servants, in such a way, as to exclude all other persons, so as to afford unequivocal notice of his own custody;" and from the cases of *Lane v. Jackson*, 5 Mass. 157, *Train v. Millington*, 12 Mass. 495, and *Naylor v. Dennie*, 8 Pick. 198, it appears that the same rule is adopted in Massachusetts. In the case of *Mills v. Camp*, 14 Conn. 219, it was held, "that a transfer of possession and an actual removal of personal property is necessary, in order to render an attachment valid, as against a subsequent attachment." The time and manner of that removal must depend, in a great degree, upon the nature and character of the property attached. In all cases, the officer has a reasonable time to effect it; and where the property is cumbersome and incapable of removal, it is dispensed with. In such case, his continual presence, by himself or an agent, is not necessary. It is sufficient if he uses due vigilance to prevent the property from going out of his control. The principle requiring a change of possession of the property attached, and its actual custody by the officer, has always been enforced in this state, for the purpose of giving timely and general notice of the attachment and lien of the officer, and to prevent fraud; as was observed by SHERMAN, J. in *Mills v. Camp*, 14 Conn. 225, "it is not only a rule of evidence, but of policy," from which, in this state, we feel no more disposition to depart in the case of attachments, than on a sale of personal property.

The plaintiff's attachment was made on the 2d day of January, 1851. The property at the time was in a room which for more than a year had been in the exclusive possession and occupancy of the plaintiff. This occupancy and possession by the plaintiff was not affected by the circumstance, that Henry & Pond occasionally placed a few articles in that room, nor that they or their servants passed through the room on some occasions, to and from its outer door; for they made no claim of a right to its occupancy for those purposes. It was a mere privilege permitted by the plaintiff, and enjoyed, as subordinate to, and subject to the will of the plaintiff. Of the same character, it would seem, was the occupancy of Mr.

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Wiley in depositing this property in that room. There is nothing in the case, inconsistent with the right of the plaintiff, to have exercised the exclusive control of the room, as against Mr. Wiley or any other person; and when after the plaintiff's attachment was made, he fastened the outer door of that room, so as to cut off all public access to it, it was a termination of the privileges which had been previously enjoyed, and a resumption on his part of its exclusive possession, as against Mr. Wiley and every other person.

But if we were to consider Mr. Wiley, previous to the plaintiff's attachment, as having a joint possession of the room with him, the plaintiff had a right, under the authority of the process in his hands, to terminate that possession for the time, at least, that intervened between his attachment and that of the defendants. This was as effectually done, so far as to constitute a *legal attachment*, by closing and fastening the outer door of that room, as if the property had been in another building, and he had taken the key. *Newton v. Adams*, 4 Vt. 437. 16 Mass. R. 420, 465. Under the circumstances of this case, we do not think that the plaintiff's attachment was defeated by not closing the door-way leading from this room to the wood-room in the same building. That passage led to no room that had ever been in the occupancy of Wiley, and it cannot be said, that a reasonable time had expired, for the plaintiff to effect a removal of the property to another place, if such removal was necessary. The case falls within the reason and rule of the case of *Newton v. Adams*, in which the court observed that, "it could not with propriety be insisted, that an officer "is bound, in order to avoid the implication of fraud, to secure the "property effectually against thieves and trespassers; all that can "be necessary in such cases is, that such possession shall be taken, "as will give sufficient notoriety to the attachment." When, in addition to that circumstance, it is found by the referee, that the defendants had actual knowledge of the plaintiff's attachment, before their attachment, that this plaintiff had marked the property as attached, and notified a clerk or workman of Henry & Pond's, who occupied other apartments of the same building, of the attachment, and requested him to notify others that came there, of that fact, we must consider, that the attachment was legal, and that the plaintiff had done all that is required in assuming, and main-

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taining the control and possession of the property. We think, therefore, the plaintiff's attachment is sufficient to perfect his right to that property, and that the defendants were not justified in taking it from him.

The judgment of the County Court is affirmed.

THE TOWN OF ROCKINGHAM v. THE TOWN OF MOUNT
HOLLY.

Paupers. Illegitimate child, by marriage of the parents and recognition after such marriage, legitimated.

By the provisions of the act of 1821, and also Comp. Stat. 865 § 5, if the parents of an illegitimate child intermarry, and recognize and treat such child as their own, it will render the child legitimate, the same as if born in lawful wedlock, and the child will take the settlement of the father, as one of the legal consequences resulting from such act of legitimation.

THIS was an action brought by the town of Rockingham to recover for expenses incurred by said town, in providing physician, nursing and necessaries for one Sarah J. Sweetland, who was at the time infected with the small pox.

Plea, the general issue and trial by the court.

The parties agreed upon the following statement of facts, to wit:

That Sarah J. Sweetland, the pauper, is the illegitimate child of one Jane Stevens; and Ira Sweetland, then of the town of Wallingford, being the reputed father of said child. Said Jane Stevens is the daughter of Benjamin Stevens, and was born at Quebec, Canada, in the year 1806. About the year 1807, said Benjamin Stevens came from Canada, to Vermont, and settled in the town of Rockingham, where he resided with his family until the year 1812, when he removed to Wallingford, Vermont, where he lived till about the year 1833. Said Jane Stevens lived with her father in said Wallingford till the month of February, 1829, when she left and went to the state of New York, where the said Sarah

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J. was born on the 17th of May, following, after which she returned to Vermont, and was lawfully married to said Ira Sweetland, at Mount Tabor, Vermont, on or about the 10th day of July, 1829, and soon after went with the said child to live with said Sweetland, at Wallingford aforesaid, where they resided till March, 1838, when said Ira, with his family, including said Sarah J., removed to the town of Mount Holly, and resided there till March, 1852, when they again returned to Wallingford, where they now live.

It was also conceded, that said Ira Sweetland gained a legal settlement in Mount Holly, by his residence there, and that neither the said Jane Stevens, now wife of said Ira Sweetland, nor said Sarah J., ever had any settlement in said Mount Holly, except as before stated. And it was further conceded, that the said Ira Sweetland, at the time of his intermarriage with said Jane Stevens, recognized the said Sarah J. Sweetland, as his child.

The parties also agreed, if plaintiffs were entitled to recover judgment should be rendered for \$—.

The County Court, September Term, 1853,—COLLAMER, J., presiding,—upon these facts, rendered judgment for the plaintiffs for the sum agreed upon, if plaintiffs were entitled to recover.

Exceptions by defendants.

R. Washburn and Washburn & Marsh for defendants.

1. The case shows, that Benjamin Stevens, the father of Jane Stevens, acquired a settlement in Wallingford, under the statute of Nov. 6, 1801.

2. Jane Stevens, the daughter of Benjamin Stevens, took the settlement of her father. Stat. of Nov. 4, 1817.

3. The case shows, that Jane Stevens' settlement at the time of the birth of her illegitimate child, Sarah J. Sweetland, was in Wallingford.

4. The said Sarah J. took the settlement of her mother, Jane Stevens, by virtue of the statute of Nov. 4, 1817.

5. The said Sarah J. did not take the settlement of her mother derived by marriage, after the birth of the said Sarah J. *Newport v. Derby*, 22 Vt. 553.

6. The said Sarah J. did not acquire a settlement in Mount Holly by her residence there in the family of Ira Sweetland, while a

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minor, and the case shows, that she did not reside in Mount Holly after she arrived at full age, sufficient length of time to gain a legal settlement. *Hartford v. Hartland*, 19 Vt. 392.

7. Section 77, of the Stat. of Nov. 15, 1821, "of Probate Courts and settlements of estates," Slade's Comp. 349, it is contended, can have no application to this case. That provision of the statute, it is insisted, was designed so to legitimate, as to render the child capable of inheriting of the putative father; and not to alter or affect the obligation or liability of towns for its support.

Stoughton & Baxter, for plaintiffs.

Ira Sweetland, the father of the pauper in question, gained a legal settlement in Mount Holly.

The pauper's mother by her marriage with said Sweetland, also gained a settlement in Mount Holly. Comp. Stat. Chap. 17 § 1.

By the Stat. of 1817, in force at the time of the marriage, legitimate children shall have the settlement of their parents, and *illegitimate* that of the mother. The pauper was born an illegitimate, in the State of New York, on the 17th of May, 1829, and on or about the 10th day of July, 1829, which was the time of the marriage, was recognized by the father, as his child, and since that time has resided with her parents in this state.

I. We contend that the act of recognition legitimates the child, and places her *in pari casu*, with a child born in lawful wedlock, investing her with all the rights and privileges incident and belonging to a legitimate child. See Act of 1821. (Slade's Comp. Stat. 349 § 77,) also, Rev. Stat. Chap. 52 § 5, and Comp. Stat. Chap. 55 § 5.

That the construction, for which we contend, is the one to be given to the statute, is obvious.—1. Because it is according to the natural and most obvious import of the language. "To legitimate," according to Webster, means, "to communicate the rights of a legitimate child to one that is illegitimate"; and in construing statutes, words are to be taken in the sense that would convey the meaning required, to all men of ordinary discernment, alike. 2. Such a construction is humane and consonant to reason and good discretion, and this is a fair test of the *intention* of the legislature. 1 Kent's Com. 462, and note.

It may be insisted that the legislature, by the act of 1821, intended simply to make a rule of *inheritance*, for the reason that

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by an act passed at the following session in 1822, they provided in what manner a putative father of an illegitimate child might legitimate such child.

But it is perfectly evident, that these statutes are not conflicting, but that each has a force and meaning independent of the other, and a different application, and both have been brought down with no material alteration, to the present time, and are synonymous with Comp. Stat. § 5, 6; the one providing in effect, that the act of recognition after intermarriage shall remove the disabilities incurred by reason of the child being born out of wedlock, &c.; the other simply provides for the adoption of the child, and making him legitimate and capable of inheritance, as respects such father, &c.

II. The doctrine of derivative settlement is based on the idea of obligation, on the part of him through whom it is derived to support the individual.

Therefore the reason of the doctrine in *Wells v. Westhaven*, 5 Vt. 322, in which it was held, that a settlement acquired by the mother by a second marriage was not communicated to her children, by a former husband; the court say, the second husband has no control over the children of the first husband, and he is not bound to support them nor entitled to their services.

In the case of a *bastard*, there is no such obligation on the part of either father or mother, which seems to us the reason of the doctrine in *Manchester v. Springfield*, 15 Vt. 885, *Burlington v. Essex*, 19 Vt. 92, *Newport v. Derby*, 22 Vt. 553;

Wherein it was held, that an illegitimate child does not take the settlement of the mother derived from her husband after the birth of such child.

In the present case, the father and mother of the child were married in less than two months after the birth of the child, and the child was then recognized by the father as his child; and it would seem to be a case where the statute should have its full beneficial operation.

The opinion of the court was delivered by

ISHAM, J. It is conceded that Ira Sweetland had a legal settlement in the town of Mount Holly. Jane Stevens, by her marriage with Ira Sweetland, on the 10th of July, 1829, took the set-

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tlement of her husband. Slade's Stat. 381; Comp. Stat. 128. Sarah J. Sweetland, who was the illegitimate child of Jane Stevens and Ira Sweetland, derived no settlement in Mount Holly, by the marriage of her mother. *Wells v. Westhaven*, 5 Vt. 322. Nor has she gained a settlement in that town by residence. It is admitted, however, that at the time of the marriage of Jane Stevens with Ira Sweetland, he recognized Sarah J. Sweetland as his child. The question arises, whether by this intermarriage and recognition, Sarah J. Sweetland derived a settlement in Mount Holly. If she has derived a settlement by that act, the town are responsible for the expenses of her sickness for which this action is brought;—otherwise, this action cannot be sustained. Comp. Stat. 515 § 2.

The act of 1821, which was in force at the time of the marriage of these parties, provides, "that when a man shall have one or more children by a woman, and shall afterwards intermarry with such woman, such child or children, if recognized by him, *shall be thereby legitimated*, and be capable of inheriting." The Comp. Stat. 365 § 5, is more specific, and provides "that the child shall be considered legitimate to *all intents and purposes*, and be capable of inheriting." In this latter statute, the legislature, evidently, intended to re-enact the provisions of the act of 1821, and, in the use of more specific language to give the construction which it was designed that act should receive. The intention of the legislature in the passage of that act is the rule of determination;—to ascertain which, all rules of construction are made subservient.

In Broom's Legal Maxims 247, the rule is given, "that in the construction of statutes, one part must be so construed by another, that the whole may stand, and if it can be prevented, *no clause, sentence, or word shall be superfluous, void, or insignificant* ;—regard is also to be had to the policy which dictated the act." If the words, "*shall be thereby legitimated*," had been entirely omitted in the act of 1821, the intention of the legislature would be evident, clearly and naturally expressed—that the right of inheriting alone was intended. But to give that limited construction to the act, when those words are inserted, would render that whole sentence superfluous and unmeaning, and be a palpable violation of established rules of construction. It would also contravene the policy which dictated the act, to limit its operation to the right of in-

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heriting property. The parents, by their subsequent intermarriage, and their recognition of the child as their own, have done every act within their power to efface the injury, and atone for the offence. Under those circumstances, the legislature intended to make the child legitimate, and to place the child on the footing of those born in lawful wedlock. They designed to efface the evidences of that transgression, by removing the incapacities that rested upon their offspring. In giving this construction to the act we give to the words, "shall be thereby legitimated," an appropriate meaning, and to all the words of the act, their ordinary signification, and enforce between those persons the relative duties of parent and child.

We are led more readily to this construction of the act of 1821, from the provisions of the act passed in 1822, in relation to the adoption of a child by its putative father. Slade's Stat. 358, No. 2. That act provides, that when a child is adopted according to its provisions, "such child shall thereafter be considered, *as respects such father*, legitimate, and be capable of inheritance." The effect of such legitimation is expressly limited to the father, and therefore, may be disaffirmed by the child within one year after coming of age. Every legal consequence, that results from that act of adoption, so far as it may effect others, is expressly cut off by that limitation. It is a reasonable inference, therefore, that a legitimation for every purpose was intended under the act of 1821, with all its legal consequences, as no limitation of its effect is made in the act. We think, therefore, that the marriage of these parents and their recognition of Sarah J. Sweetland, as their child, rendered her legitimate, the same as if born in lawful wedlock. A derivative settlement in the town of Mount Holly from her father, is one of the legal consequences, that results from that act of legitimation.

The judgment of the County Court is affirmed.

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JARVIS F. BURROWS v. STEBBINS & KENNEY.

Sale. Change of possession.

The question of change of possession is purely one of law where there is no conflict in the evidence; but where the testimony is conflicting and the facts uncertain, it must be submitted to the jury to find the facts, and the court are to say what facts, if found by the jury, constitute a change of possession.

And where A. sold and conveyed his farm to B. and also sold B. a quantity of cord wood, lying upon the farm in the vicinity of the buildings, and A. left the state; B. piled up the wood and offered it for sale, and it with the farm thus remained in the possession of B. for some months, the change of possession was held sufficient, though the vendor's family remained in the house upon the farm.

TROVER for a quantity of cord wood.

Plea, *not guilty*, and trial by jury.

On the trial, the evidence tended to show that on the 31st day of March, 1851, the plaintiff purchased of Benjamin H. Peeler, a farm in Vernon, on which said Peeler then resided, and took a deed of the same, and at the same time purchased of him certain personal property and took a bill of sale of the same. The wood mentioned in the bill of sale lay in various piles and parcels, and some dispersed and scattered in piles around in the vicinity of the dwelling house upon said farm.

That Peeler, in the course of the night of said 31st of March, absconded from the state, and did not return during the year. That plaintiff, who resided in Vernon, being informed that the creditors of Peeler were about attaching his property, went to the town clerk's and left his deed for record soon after midnight, being the morning of April 1st, 1851, and the same was duly recorded. That he proceeded directly to Peeler's house, where his family was, and removed and carried away the articles mentioned in said bill of sale, except the wood, rails and posts. That in April, the plaintiff by parol let out the plow land on said farm to Geo. Lee, to be carried on upon shares for the season, and Lee entered on the same; and in April and May, planted and improved the same and carried it on during the season.

The plaintiff was at the place from time to time during April and May, moving and repairing the fences to the grass land which he occupied through the season, removing the young orchard to

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his home farm, gathering up and placing the scattering wood into the piles, and offering the same for sale. The family of Peeler, occupied the dwelling house until the first of June, when they removed from the premises, and Geo. Lee, with the consent of the plaintiff, took possession of the house and remained through the season.

That on the 29th day of May, 1851, the plaintiff sold and deeded said farm to Samuel Lee, father of said George, and said deed was recorded; but by agreement said Samuel was not to have possession of said farm under said deed until the spring of 1852, and a writing was given to that effect by said Lee when said contract was made.

The wood was attached by the defendants, as the property of Peeler, on the 23d of June, 1851, and afterwards sold on execution as Peeler's property.

The defendants gave evidence tending to show, that said purchase made by the plaintiff was in fact fraudulent and void as to the creditors of Peeler, and on this point instructions were given by the court to the jury, to which neither party excepted.

The defendants requested the court to charge the jury, that even if the plaintiff acquired title to the property by a transfer not affected by fraud in fact, he cannot recover, unless he perfected his title by causing a visible and notorious change to be made in the possession of the property, such as would give notice to all the world of a change in the ownership. That if the jury found that the wood remained upon the premises in the same apparent position as before, until the sale of the premises by the plaintiff to Lee, by an absolute deed, which was recorded, and that until that time Peeler's family resided in the house, and that no notice was given by the plaintiff to Lee, that he owned the wood, and no agreement was made by Lee to retain the possession of the wood for the plaintiff, the plaintiff cannot recover.

The defendants also requested the court to instruct the jury as *matter of law*, what state of facts which the evidence tends to prove, will, on the one hand, constitute a sufficient change of possession, and what state of facts which the evidence tends to prove, will constitute a fraud in law.

The County Court, April Term, 1853,—COLLAMER, J., presiding,—charged the jury, that if they found the plaintiff's pur-

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chase of Peeler, was for good consideration and in good faith, they would proceed to ascertain whether the wood had, before attached by defendants, passed from the possession of said Peeler to the plaintiff so as not to be subject to attachment by Peeler's creditors. If the purchaser of personal property suffers the vendor still to retain or have the possession, use, or control, or apparent ownership of the property, it will remain subject to his creditors.

But in this case, if the jury find that the plaintiff had put his deed on record; that Peeler left the state and had taken no more possession or control of said farm or of said wood thereon; that the plaintiff by himself and tenant took possession of said farm and occupied the same; that the plaintiff picked up and put on the piles the scattering wood, and offered the wood for sale as the testimony tended to show; the wood was not subject to attachment as Peeler's property on the 23d day of June, 1851, although Peeler's family had remained in the house until the first of June, and although the wood had not been all removed in local position, nor the said Geo. Lee or Samuel Lee, informed of the plaintiff's purchase.

The jury returned a verdict for the plaintiff. To the charge of the court the defendants excepted.

E. Kirkland for defendants.

We contend,

I. That the whole current of decisions in this state down to the case of *Stephenson v. Clark*, 20 Vt., has been for the court to instruct the jury as matter of law, whether the particular facts disclosed by the evidence constituted a sufficient change of possession; to decide that the sale was fraudulent *per se* in law for want of it; that this has been the practice of the county court; and it was error, to refuse, or omit to do so in this case. *Durkee v. Mahoney*, 1 Aik. 116. *Boardman v. Kesler*, 1 Aik. 158. *Mott v. McNeil*, 1 Aik. 162. *Weeks v. Mead*, 2 Aik. 64. *Beattie v. Robin*, 2 Vt. 181. *Wilson v. Hooper et al.*, 12 Vt. 653. *Dewey v. Thrall*, 13 Vt. 281. *Stiles v. Shumway*, 16 Vt. 435. *Mills v. Warner*, 19 Vt. 609. *Hutchins v. Gilchrist et al.*, 23 Vt. 82.

II. That the Supreme Court of this state has decided again and again, that where there had not been an open, visible, and substantial change of possession, the sale even though *bona fide* be-

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tween the parties, is fraudulent *per se*, as to after attaching creditors. 1 Aik. 116. 1 Aik. 162. 1 Aik. 158. 2 Vt. 64. 16 Vt. 435. 12 Vt. 653. 13 Vt. 281, before cited and *Judd et al. v. Langdon*, 5 Vt. 231. *Rogers v. Vail et al.*, 16 Vt. 327.

III. That the facts disclosed by the evidence in this case, do not constitute in law a sufficient change of possession, to render the sale valid as against after attaching creditors. 1 Aik. 162. 2 Aik. 64. 5 Vt. 231. 12 Vt. 653, before cited and *Morris et al. v. Hyde*, 8 Vt. 352.

IV. The plaintiff cannot rely on constructive possession being in him, for Peeler's family remained there till Lee bought and entered, and the record would show title in Lee. The written reservation amounts to nothing, as it was not recorded. *Stephenson v. Clark*, 20 Vt. 624.

2. The defendants would not have found out by reasonable inquiry, for Lee the man in possession and occupancy knew nothing of it. *Stephenson v. Clark*, 20 Vt. 624.

D. Kellogg and J. D. Bradley for plaintiff.

I. *Constructive* possession would follow the property in an article like "cord wood," bulky and difficult to move even if it were on the land of a *third person*, not notified. *Hutchins v. Gilchrist*, 23 Vt. 83.

But this wood remained nearly three months after the purchase on the plaintiff's *own land*.

II. And his *actual* possession of these wood piles had during all this time been as perfect as can well be conceived.

For instance—1. In April and May, he "gathered it up, placed it into piles, and offered it for sale."

The letting the plough land to Geo. Lee on shares, gave no possession either of land or wood to *Peeler*, nor did it in the least impair plaintiff's possession of the wood.

2. Even if the attachment had been prior to the first of June, and while *Peeler's* family occupied the *dwelling house*; this wood does not appear to have been in their possession. They occupied the dwelling house, and these piles and parcels were "in the vicinity" of the dwelling house. There was not even *contact* found. No *benefit*, use, or *control* on the part of the family is found to have existed, as was the case in *Stiles v. Shumway*, 16 Vt. 435.

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3. But the plaintiff and his tenant had the entire and perfect possession of the *whole* property, including *house, farm, and wood*, for twenty three days after even Peeler's *family* had gone.

4. The purchaser of an article, who has the *possession* may move it or not as he pleases. *One* of the rights of ownership in a thing is the right of *keeping it still and unmoved*.

We think, moving each stick end for end would not materially strengthen the plaintiff's title.

The opinion of the court was delivered by

REDFIELD, Ch. J. The only question reserved in this case is in regard to the sufficiency of the change of possession, and that seems to arise chiefly, from a misunderstanding of terms, or from understanding them differently. And having been, as would seem, somewhat misapprehended, in what I said in the case of *Stephenson v. Clark*, 20 Vt. 624, it is possible I may not be able to escape all liability to the same thing, in this case.

I recollect, that some of the judges have heretofore said, and possibly some such *dicta* may be found, that a question of change of possession, on the sale of chattles, was never to be submitted to the jury, but always to be decided, by the court. And hence it was claimed, by one very distinguished member of the court, at the time, that *Hall v. Parsons*, 17 Vt. 271, had virtually abrogated the rule. But the court do not so consider the matter, and it is evident the judge, who tried this case, did not so understand the decisions, upon the subject. And that is what is complained of, it may be said.

Now it is obvious that the distinction, which is attempted to be made between the cases, where this question has been submitted to the jury, and those where it has been decided by the court, is not a difference in principle, but only one in the state of the testimony. In every case, where there is no conflict in the evidence, the question of change of possession is purely one of law, and as such to be decided by the court. But where the testimony is conflicting and the facts uncertain, it must be submitted to the jury, to find the facts, and the court are to say what facts, if found by the jury, constitute a sufficient change of possession. And this is precisely what the court did in this case, and as there appears to have been no controversy about the facts, upon this point, the court might

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have told the jury at once whether the facts were sufficient, which they did do, in other words. It is certainly difficult to see how a court could have done more, than they did, in this case, to decide the matter of law, arising in the case.

And we think the charge was correct in this case. There seems to be no pretence, that the property remained in the possession of the vendor, for he left the country immediately after the sale, and surrendered the possession of the farm to the vendee, who had a deed on record. He piled up the wood, offered it for sale and did all that any one could be expected to do, with property of that kind. And the fact, that the vendor's family remained in the house could not tend to mislead any one. And that the person to whom the vendee sold the land, was not informed who owned the wood, could not be likely to mislead any one, inasmuch, as the farm and the wood, had been for some months, in the possession of the vendee.

We do not deem it important to explain the case of *Stephenson v. Clark*, for what is there said is sufficiently perspicuous, if applied to that case. Change of possession is mainly a *fact*, like possession, or seizin, or evidence, but of course the facts being conceded, or found, all these matters then resolve themselves into a mere judgment of law. No man can determine whether a change of possession has taken place, until informed of the *facts*, and if there is any conflict in regard to the facts, the matter must be submitted to the jury, under proper instructions, as is said in *Stephenson v. Clark*. This question has to be submitted to the jury more commonly, where the testimony leaves it uncertain, who exercises dominion over the property.

Judgment affirmed.

Weatherhead et al. v. Field, Admr.

JOHN WEATHERHEAD & OTHERS v. ELIHU FIELD, ADMR.

Advancement. Evidence.

The declarations of an intestate, whether made at the time of making the entries in his book against his children, or afterwards, are inadmissible as evidence of the intention of the intestate in making such entries.

Whether such charges were intended by the intestate as an advancement, must be evidenced by the book, and the intention of the intestate gathered from the book, and parol testimony is inadmissible to control the intention of the intestate.

APPEAL from a decree of the probate court for the district of Marlboro, distributing the personal estate of John Weatherhead.

On the trial, the administrator produced a book, in which were certain entries made by the intestate in his life time, at the back part of said book, which the administrator contended, tended to show that such entries were evidence of advancements to the appellants, and were so intended by the intestate.

The appellants contended not only that the entries in the book were insufficient to show that they were evidence of advancements, but also offered to prove, that the intestate repeatedly declared in his life time, and at the time he made the entries, and up to the hour of his death, that such entries were not made as charges against the appellants, or as advancements to them, but only as memoranda, that he had treated his sons alike. This evidence was excluded by the court. To which decision the appellants excepted.

The court,—COLLAMER, J., presiding,—on inspection of said book, and without other testimony, affirmed the decree.

Exceptions by appellants.

E. Kirkland for the appellants.

Two questions are presented by the exceptions.

1. Was evidence of the declarations made by the intestate, at the time of the entries, and up to the hour of his death, admissible to show his intentions in making the same?

2. Are the entries in the book sufficient evidence of an advancement?

I. The intention of the statute was to substantiate a certain

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species of evidence, which without such provision might be doubtful; and not to enumerate those particular species, to the exclusion of all others. *Brown v. Brown*, 16 Vt. 204. *Quarles v. Quarles*, 4 Mass. 680.

This was certainly the case under the statute of 1821, and

2. Under the Revised Statutes, we contend, it is an open question in this state.

II. A portion of the entries were made while the statute of 1821, was in force, and must be governed by that. *Whitman v. Hapgood et al.*, 10 Mass. 437.

III. The entries themselves are not sufficient evidence of advancement. They are charges on book, therefore debt, and mere debt cannot be charged as an advancement on the share of an heir. *Proctor v. Newhall*, 17 Mass. 81. *Osgood v. Reed*, 17 Mass. 356. *Barton v. Rice*, 22 Pick. 508.

IV. The entries in themselves, are not sufficient evidence. *Ashley, ex parte*, 4 Pick. 21. *Bulkley v. Noble*, 2 Pick. 337.

Keyes & Howe for defendant.

I. The court below did right in excluding testimony to explain the charges upon the book of the deceased.

1. The statute makes the gift imperative; that it shall be reckoned as advancement, when charged as such. Comp. Stat. 366 § 8 and 9.

2. This course is sustained by the decisions in this state. *Newell v. Newell*, 13 Vt. 33. *Brown v. Brown*, 16 Vt. 197-204. *Heirs of Adams v. Adams*, 22 Vt. 51-64. *Barton v. Rice*, 22 Pick. 508.

II. The evidence in the book tended to show, that the items were advancement, and proper evidence to be submitted to the jury, and they have found that it was advancement. *Brown v. Brown*, 16 Vt. 197.

The opinion of the court was delivered by

ISHAM, J. We are satisfied that the testimony offered by the appellants in relation to the declarations of the intestate, was properly rejected; whether those declarations were made at the time the entries were placed on the book, or at any time afterwards. The principle of its exclusion is the same, whether the question,

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arises under the act of 1821, Slade's Ed. 394 § 76, or the Compiled Statutes 366 § 8, 9. From the case of *Quarles v. Quarles*, 4 Mass. 683, it appears that the act of 1821, is nearly a transcript of the act in Massachusetts, passed in 1783. In that case an opinion was expressed by SEDGWICK, J., that in determining the question of an advancement, "the intention of the statute was "to substantiate certain species of evidence, which, without legislative provision, might be doubtful; and not to enumerate those "particular species, to the exclusion of all others." A similar opinion was expressed in the case of *Brown v. Brown*, 16 Vt. 203. A different construction, however, was given that statute in the case of *Newell v. Newell*, 13 Vt. 33. In that case it was considered that the statute prescribes the evidence of an advancement, and declares what its effect shall be, if an advancement is evidenced by a deed of real estate, given for love and affection, or by charges made by the intestate on his book, in either event, the intention of the party is to be gathered from the face of the deed, in one case, and from the book, in the other; and in both cases parol testimony is equally inadmissible, to control the intention of the intestate. In the case of *Adams v. Adams*, 22 Vt. 64, the court remarked, "that the views expressed in the case of *Newell v. Newell*, "are, in the main, the general opinion of the profession, in this "and most of the American states." Our present statute is more specific in its provisions on this subject; in the construction of which all are agreed, "that the statute declares what shall be evidence of an advancement, and excludes all other evidence." 16 Vt. 203. The same construction is given to the existing statute in Massachusetts, which is similar to our present statute. *Barton v. Rice*, 22 Pick. 508. *Ashley, ex parte*, 4 Pick. 24. In the case of *Adams v. Adams*, it was also observed "that it is almost "certain that the compiled statutes were not intended to introduce "any new law upon the subject." We think that is the true construction of the statutes, and that this is the only construction calculated to avoid the evils, which led to their passage. It becomes immaterial, therefore, whether the charges in this case were made, while the act of 1821, or the Compiled Statutes were in force; in either case the book of the intestate, and the charges there made, furnish the only evidence competent to determine the question, whether the charges are to be treated as advancements.

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This construction is calculated to remove all causes of controversy among the heirs, after the death of the intestate, and will enable the intestate himself, during his life, to know with certainty, the required evidence of his intention on that subject. There was no error, therefore, in excluding the evidence of the declarations of the intestate, and regarding the charges on the book of the intestate, as furnishing the only competent evidence, whether those charges were to be treated as advancements.

A more difficult question arises in this case, whether the book of the intestate itself, furnishes sufficient evidence that these charges were intended as advancements, and to be treated as such in the distribution of the intestate's estate. The true idea of an advancement, is a delivery by the parent during his life, to one or more of his children, the whole or a portion of that, to which the child would be entitled, on a distribution of the estate after the parent's decease. It is distinguishable from a gift, which parents may make to their children, whether to a greater or less amount; for in such case, there is no intention to have it chargeable on the child's share of the estate. It is also to be distinguished from a debt; for in the case of an advancement, the common relation of debtor and creditor does not exist. The property was not delivered or received as borrowed capital. *Osgood v. Breed*, 17 Mass. 359-98. 4 Pick. 21. In the case of charges on book, or memoranda made by the intestate, those circumstances must be disproved. The inference must be fairly drawn from the book itself, that an absolute gift or a debt was not intended. If that appears the legal intentment will be, that the property was delivered as an advancement. In the cases of *Brown v. Brown*, 16 Vt. 204, and *Bulkley v. Noble*, 2 Pick. 340, it was held, "that no particular form of words is required to show an advancement; an entry on the books of the intestate of property delivered to a child, made in such a manner as to exclude the idea of a debt, is evidence that it was intended for an advancement."

In the present case, it is quite manifest that an absolute gift was not intended by the intestate. If such had been the intention, those entries would not have been made on book; nor would the word "Dr." have been entered against the charges. The fact that the several heirs are charged with these different sums as "Dr." is a circumstance to show that a debt was intended, and if

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the charges had been entered on his book among charges to other persons, where a debt was evidently intended, it would be difficult to resist the inference, that such intention existed in relation to these charges. But that circumstance is not conclusive. It may have been a matter of form; or which is as probable, the intestate may have charged it as a claim, to be paid or satisfied on the final distribution of his estate among his children. In either case the word "*Dr.*" may have been entered against the charges, without altering their character as advancements. Those charges having been made and entered, not where his accounts against other persons were kept, but on separate and different leaves in the latter part of his book, has a more controlling effect in ascertaining the intention of the intestate. There could have been no object in making the charges in that manner, if an existing debt was intended; or one, the collection of which he intended to enforce. His four daughters were advanced each in the sum of one hundred dollars, about which there is no doubt. The first charge against each of his sons, is for the same amount, being for money earned before they were of age. With the propriety of those charges we have nothing to do, that consideration is not involved in the case; the only question is, were those charges made and intended as advancements? We are impressed with the belief that the intestate intended those charges as an advancement, equal in amount, to that of each of his four daughters. That inference is also to be drawn from the length of time during which those charges have remained on his book, without in any instance treating them as an existing debt due to him. In the case of John Weatherhead the charge was made in 1829; Orrin Weatherhead, in 1831; Hiram Weatherhead, in 1838; Edwin Weatherhead, in 1846, and Charles G. Weatherhead, in 1850. These entries made at different times during the period of about twenty-five years, rendered it quite evident that he regarded them as subsisting matters, not as debts, nor as absolute gifts, but as matters of value to that amount, which they had received, and which were to be taken into account, whenever his estate should be divided between them. The other items, being charged in the same account, and as a continuation of the same, must be considered in the same light. We think, therefore, that the judgment of the county court must be affirmed, and certified to the probate court.

Rand et al. v. Townshend.

CHESTER RAND, J. FRANKLIN, JR. & OTHERS v. THE TOWN
OF TOWNSHEND.

Session proceedings. Re-appraisal of land damages, for laying out highways. Certiorari. Mandamus.

In a petition for a re-appraisal of land damages for laying out highways, any number of land owners, though holding by independent titles, may join in the same petition.

The owner of the land, at the time the road is laid, is the person and the only person, to petition for a re-appraisal of damages.

Where the judgment of the county court in such proceedings is erroneous, the writ of *mandamus* under our practice is the most appropriate proceeding.

PETITION for a writ of *certiorari*. The facts in the case are substantially as follows :

In 1841, the selectmen of Townshend, laid out the highway in question, and made the usual orders ; that said highway remained unbuilt till the spring of 1851, when the town chose an agent to superintend the building of the road ; that in the meantime the lands had changed owners several times, with the exception of one farm belonging to J. Franklin, Jr.

That in August, 1851, the petition for commissioners issued to have the land damages re-assessed, and Townshend was cited to appear before the justice, and did appear, and by their attorney, John Roberts, objected, as a bar to the appointment of commissioners, that the land owners had all been settled with at the time of laying the road by the selectmen ; that a formal plea in bar was introduced by Judge Roberts, who offered to produce testimony in support of the same, which the justice declined to hear, and there has never been a hearing upon this matter.

That the justice appointed commissioners, who having given notice of time and place of meeting, proceeded to examine the premises, and appraised damages at more than \$40, to each petitioner and made their report to the county court.

That Townshend appeared before the county court, and by their attorney made the same objections as were made before the justice and offered the same testimony ; but the county court decided that they had no jurisdiction of that matter ; the town of Townshend

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then took exceptions to the acceptance of the report, and the county court set it aside.

And the present petition for *certiorari* is brought alleging that there was error in the judgment of the county court.

The facts, touching the questions passed upon by the court, sufficiently appear in the opinion of the court.

A. Stoddard and Stoughton & Baxter for petitioners.

J. Roberts and Butler & Knowlton for petitioners.

The opinion of the court was delivered by

REDFIELD, Ch. J. This is a petition for writ of *certiorari*, which was heard by the court, some terms since, and the papers taken by the court and have never been returned. We have heard it again this term, without either the original files or copies, which is certainly a very loose mode of proceeding. But we hope it will not, in the present case lead to any embarrassment.

1. We think the statute intends, that in these petitions, for the re-appraisal of land damages, for laying out highways, any number of land owners, who are dissatisfied, although holding by independent titles, may join in the same petition. Comp. Stat. p. 164 § 20.

2. We think the owner of the land, at the time the road is laid, is the person, and the only person, to bring this petition. The words of the statute p. 164, § 20 are, "Any person, interested in lands, through which any highway is laid out, &c., may petition. This must signify the person interested, at the time the road is laid out, i. e. if the road is laid out in the ordinary mode. The claim for damages does not indeed become perfected, till the road is laid open for work. But in the county and Supreme Court, the persons entitled to damages are named in the report of the commissioners and a virtual judgment is given, for the damages awarded, in favor of the several claimants. And if not paid within the time limited by the court, execution issues. In such cases, there could be no question, that any subsequent purchaser of the land, could have no claim for the damages, unless acquired by express contract. And we see no reason, why the same rule should not apply, to damages awarded by selectmen, and if so, this must fix the date of

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the claim for damages, where none are awarded to that period ; although not recoverable, till the road is laid open for work. This will dispose of all the claims, in this petition except Franklin's, whose title seems to have existed at the time the road was laid out. Certainly nothing at present appears to show the contrary. And this we think is sufficiently alleged, in the petition. But it would seem from the answer to the petition, before the justice, and from testimony which the counsel say was filed in the case, that some questions of fact were attempted to be raised in the county court in regard to the right of Franklin to recover damages. But there is certainly not very much to determine how that was viewed by the county court. It seems probable, from the reason assigned for the judgment, that the questions of fact were not determined by the county court.

But we think the reason assigned for the judgment is unsound, and that the complaint, or petition, is sufficient to entitle Franklin to judgment. But if the court order the writ to issue and bring up the record and render judgment for Franklin, we thereby deprive the defendants of any decision, any where, upon the matter of fact, which they are certainly entitled to have.

We must then either deny this writ, or if we allow it, must finish the case here, since we have not ordinarily sent cases, which come into this court, to the county court, unless a matter of fact, proper for the jury, is necessary to be determined. And we are not prepared to finish the sessions business of the county court, in this court. We think therefore that until the case is fully tried, and ended in the county court the process of *certiorari*, under our practice is not the most appropriate proceeding.

A writ of mandamus seems to us to be more suitable, and as we do not now see, why that is not adequate to all the matters required in the present case, we shall give the party opportunity to take such proceeding. We might under such a proceeding, I think, require the county court to correct the present judgment and give judgment for Franklin, unless some defense was made out upon other grounds, and the case is continued to enable the petitioner to file a motion for a writ of mandamus, which may be heard at the next term, if any further hearing is desired, which probably will not be, unless new facts are elicited.

Ballou v. Ballou et al.

MATURIN BALLOU v. LEONARD BALLOU & GEO. H. SALISBURY.

Abatement. Discontinuance of a suit and notice.

A second suit for some of the same things, sued for in a former suit, still pending, will not abate in whole or part the other suit.

Notice of a discontinuance of a suit need not be in writing, unless for the purpose of saving costs.

TROVER for four horses, four harnesses, four whiffletrees, two neck-yokes, and one wagon.

The defendant Salisbury pleaded in abatement, "and says he
"ought not to be compelled to answer to said writ and declaration
"because he says that the said Maturin Ballou, on the 14th day of
"October, A. D. 1852, prayed out from John Roberts, Esquire, of
"Whitingham, in said Windham County, then and still a justice of
"the peace for said county, a writ of trover against said Salisbury
"and one Willard A. Dennison, of said Whitingham, returnable be-
"fore said Roberts, justice of the peace at said Willard A. Den-
"nison's inn in said Whitingham, on the twenty-eighth day of Oc-
"tober, A. D. 1852; that the said writ was duly served on said
"Salisbury and said Dennison, on the 20th day of said October,
"and on said 28th day of said October, was duly heard and tried
"before said justice of the peace at said Whitingham, and that
"judgment was then and there rendered by said justice that the
"said Salisbury and Dennison were guilty of the conversion com-
"plained of in said action, and that the said Maturin Ballou should
"recover of said Salisbury and Dennison, the sum of eight dollars,
"damages and six dollars and sixty-five cents costs, in said suit,
"and the said Salisbury and Dennison, within two hours after the
"rendering of said judgment prayed that an appeal might be
"granted to the county court, then next to be holden at Newfane,
"in and for said county of Windham, on the third Tuesday of
"April, A. D. 1853. Whereupon said justice allowed said appeal,
"and the said defendants, Salisbury and Dennison, as principals and
"Waters Gillest, as surety, recognized to the said plaintiff for the
"prosecution of said appeal in due form of law before the said
"justice, as will appear by the records of said justice, duly certi-
"fied copies of which the said Salisbury brings here into court.
"And the said Salisbury avers that the said action, or suit so

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"brought before said Roberts was for the conversion of a certain harness, which was one of the same harnesses alleged in and by the present suit to have been converted by said Salisbury and said Leonard Ballou; and that the cause of action in the said suit before said Roberts, and in present suit is the same; and that the said appeal to the said county court was still pending when the suit of the said Maturin, against the said Salisbury and the said Leonard Ballou, was commenced, and remained so pending until after the commencement of said term of said county court—and this he is ready to verify; wherefore he prays," &c.

To the defendant, Salisbury's plea in abatement, the plaintiff filed his replication, "and says that by anything in said plea of said Geo. H. Salisbury above alleged, his said writ and declaration ought not to be quashed because he says, that after the appeal in the suit of himself against the said Willard A. Dennison and George H. Salisbury, and before the commencement of this suit, the said plaintiff finding his said suit against the said Dennison and Salisbury would be ineffectual to obtain his just rights because the said writ and declaration did cover only a part of the property converted, to wit: one harness, as appears by a certified copy of said writ and declaration now on file in this court, did thereupon for the purpose of procuring a fair and speedy trial to recover for all the property of the plaintiff converted by the said Leonard Ballou and Geo. H. Salisbury, give due notice to the said Dennison and Salisbury, that his said suit against them would be prosecuted no further, and tendered to them their legal costs in and about said suit, and did thereupon commence this suit against the said Leonard Ballou and Geo. H. Salisbury—and this he is ready to verify; wherefore he prays judgment that the said defendants answer over to the said writ and declaration."

To the plaintiff's replication defendant Salisbury demurred. The court,—COLLAMER, J., presiding,—overruled the demurrer, and ordered the defendant to answer over.

To which decision of the court, the defendant, Salisbury excepted.

J. D. Bradley for defendant.

W. H. Follet for plaintiff.

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The opinion of the court was delivered by

REDFIELD, Ch. J. The plea itself it seems to us is insufficient, upon its merits. The suits are neither between the same parties, or for the same thing, as sufficiently appears by the plea itself. So that it is very questionable whether the second suit, under the circumstances, can be regarded as vexatious. Because a second suit is for some of the same things, sued for in a former suit, still pending, it will scarcely do to say, that it will abate, either in whole, or in part, the other suit. And the averment, that a suit for one harness is for the same trespass, as a suit for two or more harnesses is, with no explanation, and none is attempted in the plea, repugnant, and too uncertain, for a plea in abatement.

The replication is in the main good, and as a general demurrer may probably be upheld. The plea and replication taken together would seem to show, that the first suit was defective, in fact.

2. But this is not probably necessary.

3. It is sufficient if the party *bona fide* give notice of discontinuance.

4. I am not aware that it has ever been held that it is needful to have this in writing, unless for the purpose of saving costs.

5. In a replication to a plea in abatement, it will probably be sufficient, to allege due notice of discontinuance, without setting out the particulars.

Hill v. Dunlap, 15 Vt. 645, decides that notice of discontinuance, need not be in writing, to avoid the effect of a plea in abatement, but that it must be in writing to deprive the party of his claim for costs, which is probably the only legal difference, in the two forms of notice.

Judgment affirmed.

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**BENJAMIN STEVENS, TRUMAN YAW AND DUTTON & CLARK v.
FATIMA GOODENOUGH.**

[IN CHANCERY.]

Subrogation. Equities on land. Notice, &c.

The defendant bought a farm for which she was to pay \$700, and paid \$500, and her husband joined with her and mortgaged the same to secure the payment of the said \$300; subsequently she conveyed a certain portion of the farm to him and he agreed to pay the \$300; after this, defendant was divorced from her husband, and he neglecting to pay the \$300, the mortgagee foreclosed, and she, with certain creditors of her husband who had levied upon the farm for debts of her husband, joined with them and paid off the mortgage in the proportion of their claims; it turned out that the levies were defective and void, and they brought their bill in chancery to compel her to refund the money so advanced by them, she having subsequently levied upon the interest of her late husband to enforce payment of the money advanced by her for the redemption of the farm—*Held*—that plaintiffs were chargeable with notice of the equity resting upon the land on which their levies were made; and that under the circumstances, defendant had a right to secure her debt on the property of her late husband, and having done so, she is not only the first in diligence, but the first in right.

It was also held, that defendant had the right, by subrogation, to the remedies and securities in the hands of the mortgagee to compel payment from G. (her late husband) or from those claiming under him; and the payment by defendant having been after her divorce from G., she had the right to prosecute G. for the money paid, and levy her execution upon G's. property for its satisfaction.

APPEAL from the court of chancery.

The bill charges, that January 19, 1850, the defendant and Gaius R. Goodenough, her then husband, owned as tenants in common a farm situated partly in Brattleboro and partly in Guilford, of which the defendant owned five undivided eighths for life, and Gaius R. the other three-eighths, and the remainder of the five-eighths at defendant's decease. That Gaius R. was indebted to the orators severally, and that they each sued him before a justice of the peace, and obtained judgments. Dutton & Clark for \$42,-64; Lynde for \$32,19; Yaw for \$13,22; and Stevens for \$39,79.

That they took out their several executions and levied them January 19, 1850, on Gaius R's. three-eighths of said farm. That Gardiner Briggs, as executor of Joel Bolster, had a mortgage of the whole farm executed to him by defendant and Gaius R. of a

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date earlier than the levies; that Briggs foreclosed his mortgage April Term, 1850. That at the February Term, of the Supreme Court, 1850, the defendant obtained a bill of divorce from Gaius R. That the orators were compelled, in order to obtain the land under the levies, to pay up the decree, and that shortly before the 28th of April, 1850, it was agreed between Edward Kirkland, Esq., the orators' attorney, and Asa Keyes, Esq., the defendant's attorney, that the orators should pay as their proportion of the sum named in the decree \$100,18, and that the defendant should pay the rest—that accordingly on the 28th day of April, 1850, the orators believing their levies to be good and acting in good faith, paid to the clerk of the court for the redemption of the premises \$100,18, of which Dutton & Clark paid as their proportional share \$80,18; Lynde \$28,86; Yaw \$10,18; and Stevens \$30,96, and the defendant paid the rest. That the orators brought their petition against the defendant for partition of the farm at the September Term, 1850, and the defendant appeared and resisted the petition, and at the April Term, 1851, the court dismissed the petition on the ground that owing to the negligence of the constable, who made the levies, in not making his returns to the justice, the said levies were void. That the defendant sued Gaius R. and attached this farm October 21, 1850, and recovered judgment against him September Term, 1851, for \$196,70, took her execution and levied it, November 25, 1851, on all that part of the farm lying in Brattleboro, and his whole interest in that part of the farm was set off to her. That May 6, 1851, Gaius R. conveyed his interest in the farm to said Stevens, by warranty deed in trust, for the benefit of the said Stevens and the other orators. That the defendant from January 19, 1850, and long before, and till now has been in possession of said farm, taking the whole profits, &c.

Prayer of the bill, That defendant may be decreed to pay to each orator severally the sums paid by each, to redeem the Briggs' mortgage, with interest from the time of such payment, and for further relief, &c.

The defendant answered, and says that she is the daughter of Joel Bolster, who died June 1, 1845, possessed of the farm in question; that Gardiner Briggs was appointed executor of his will; that she had a claim against his estate allowed by the commissioners at \$500. That the executor, Briggs, March 8, 1847,

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obtained license from the probate court to sell the farm, and sold it to her March 30, 1848, for \$700; that she had married since her father's death, and that she paid \$500, of said price by her claim against the estate, and she and her husband, Gaius R. gave their note to Briggs, for the balance \$200, and mortgaged the premises to him to secure it. That difficulties arose between her and her husband, he complaining that he was holden to pay the note of \$200, to Briggs, and still he had no title to the land; that for the purpose of quieting the troubles between them, she finally agreed to let him have three-eighths of the farm, and the other five-eighths at her decease, on his agreeing to pay the \$200 note to Briggs; and to carry out the agreement, she conveyed the farm, Sept. 16, 1848, to said Samuel Dutton, and he on same day, conveyed to her five-eighths for life, and to her husband three-eighths and the remainder at the termination of her life estate, her husband then agreeing to pay the \$200 note to Briggs; that no writings were made about this agreement of his to pay said note, because he was already legally holden to pay it, and she was not, on account of her coverture, and no writings were thought necessary; that all this was well known to said Dutton & Clark, at the time of said Dutton making said conveyance, and to the other orators before their said levies. That said Gaius R. neglected to pay said note, and Briggs foreclosed the mortgage, and the time limited for payment was April 28, 1850; that at the February Term, of Supreme Court, 1850, she obtained a divorce from her husband, and finding he was making no preparations to redeem the mortgage, she made preparations to pay Briggs' claim, if he should not. She admits that the orators had effected some kind of lien on Gaius R.'s three-eighths of the farm, which liens she supposed to be valid, but she believed then and does still, and insists that if their lien had been valid, they took said three-eighths subject to the same equities under which said Gaius R. held the same, which was to pay off the whole of said mortgage. That shortly before April 28, 1850, when Briggs' decree would become absolute, she called on Asa Keyes, Esq., the attorney and solicitor of Briggs in the foreclosure, to ascertain the amount to be paid to redeem the land, who told her the amount due on the 28th April, 1850, would be \$264.48, which she must see paid, and further told her that if said Gaius R. or those who had levied upon his three-eighths should pay their

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proportion, she would have only \$165,30, to pay; that she paid that sum and understood the orators paid the balance; denies that any agreement was made between her and the orators, or between their attorney and hers; denies any understanding on the subject between her and the orators, or between their attorney and hers; denies that said Keyes had any power to act for her; denies that she ever employed him in anywise relating to said mortgage, or foreclosure or redemption of the same; insists that whatever she said to him was as to the attorney of Briggs, and not as to her attorney; says she knows nothing of the alleged agreement between said Keyes and Kirkland, and refers orators to their proof; admits the orators' levies on the land and their payment of the portion of the mortgage money as set forth in the bill; admits the bringing of the petition for partition as alleged, that she opposed it, and its dismissal, but denies that the dismissal was for the cause alleged, but for other causes apparent of record in said petition; admits after her divorce, and being compelled to pay said \$165,30, to redeem said mortgage, which she says it was the duty of said Gaius R. to pay, she sued him for the money paid, recovered judgment and levied her execution on his lands in Brattleboro, as she had a right to do, and said execution has been returned satisfied in part only; admits that she has occupied the premises and taken the profit, &c., from January 19, 1850, but avers that from January 19, 1850, till the close of February Term, of Supreme Court, same year, she occupied the same with the children of said Gaius R. as his lawful wife, that from the time of her divorce till the levy of her execution she occupied his three-eighths, but has during all that time from the rents &c., and her own industry supported his two minor children, and that said rents, &c. are a meagre remuneration for so doing; that since said levy she has occupied the premises in her own right, as neither Gaius R. nor any one under him has claimed the occupancy, and during all that time hitherto she has supported said minor children. Admits the execution of deed by Gaius R. to Stevens as alleged; insists that the orators having paid said money without any fraud, collusion, interference, concert, agreement or request of hers, but voluntarily coming in under said Gaius, they can have no greater equity against her than he could, if he had paid the money; insists that if said Gaius had made the payment he could have had no claim in equity against

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her for reimbursement, and that orators have no such claim in equity; and that as she has obtained the premises in due course of law, equity will not disturb her in the enjoyment thereof, or compel her to make further advances in relation thereto.

The chancellor dismissed the bill and plaintiffs appealed.

Wm. C. Bradley for orators.

It is not particularly necessary to inquire how far the separate property of the wife was liable in equity for the payment of the whole note given by Fatima and her husband to Briggs, as to which, see 2 P. Wms. 144, *Clark v. Miller*, 2 Aik. 379, 17 Ves. 365, 18 Ves. 258, because it is admitted that he received no consideration for so doing, and in such cases, by the decisions, (*Bogot v. Oughton*, 1 P. Wms. 348,) it is questioned whether even his personal estate would have been holden in equity so long as her estate was sufficient; it was on his demand of security for his liabilities at law, that he required the conveyance of part of the equity of redemption of the mortgaged estate. He has paid nothing, and she with his creditors paid the amount of the mortgage money.

And the consideration having failed upon which the creditors in good faith joined her in paying the money, and she without any new payment or consideration having obtained the whole property with full knowledge of the circumstances, it would seem but equitable, that having received the benefit she should bear the burden of refunding the money.

It is attempted to be made out, that she was not conversant of or privy to all the circumstances of the payment, because her attorney acted in a double character; it would be singular indeed if such an evasion could avail here. If he received her money as the attorney of Briggs only, it must be recollected, that he received the full amount of the mortgage and that the creditors being kept in ignorance of that fact were directly misled to pay a part, and as she does not suggest to the contrary, it must be presumed that such part was returned to her and became our money in her hands.

If he acted as the attorney of Fatima, as he was supposed to do, the previous arrangements for the payment and the transactions accompanying it must be held to be the same, as if she was a party thereto, and they sufficiently show that it was neither gratuitous

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or voluntary, but made through mutual mistake of both parties in relation to the title of the creditors, and it will hardly be contended, that money paid on such grounds ought not to be refunded by some one; it need not be the husband, for he never requested or assented to it, and if it be put on the ground of benefit, it resulted to Fatima. The creditors were never really substituted to the rights of any person.

If they had made out their title, they would have been substituted to the rights of the mortgagee, Briggs. *Baldwin v. Banister*, 3 P. Wms. 251. 2 Story's Equity 1023.

And it was not necessary to join either the husband or Briggs, as partners, they having no further interest in the premises than what can be fully covered by a decree between the parties in the present suit. *Payne v. Hathaway*, 2 Vt. 212. *Day v. Cummings*, Vt. 496.

A. Keyes for defendant.

The Briggs' debt was originally owing by defendant, but by the marriage and giving of the note and mortgage, it became the debt of Gaius R. Goodenough, and he alone was holden to pay it.

I. The payment of the Briggs' mortgage was the consideration of the conveyance of three-eighths to Gaius R., and the defendant had a *lien* thereon, until the consideration was paid by him. *Manly v. Slasson*, 21 Vt. 271.

1. For Dutton & Clark had notice of the consideration at the time of the conveyance, and notice of the non-payment at the time of their *levy*.

2. The other orators, making their levies at the same time with Dutton & Clark, and in concert with them, are presumed to have the same information.

3. These conveyances and the Briggs' note and mortgage all on record, were sufficient to put the orators upon inquiry, and amount to notice to them of the *lien*. Story's Equity 388. *McDaniels v. Flower Brook M. Co.*, 22 Vt. 274.

4. At the time of the orator's *levy*, and a long time before, the defendant was in actual possession, taking the rents and profits; this was sufficient to put them on inquiry and becomes notice. *Chesterman v. Gardner*, 5 Johns. C. R. 29.

II. By the deed of three-eighths to Gaius R. Goodenough, and

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his contract to pay the Briggs' debt, Gaius R. became the principal in said debt, and the defendant a mere surety. *McDaniels v. Flower Brook M. Co.*, 22 Vt. 274. And this was well known to Dutton & Clark and the rest of the orators.

And if she being in fact surety was compelled to pay off any part of that incumbrance, she had an equity to be subrogated to all the rights of Briggs, against Gaius R. and all persons claiming under him. 22 Vt. 274.

But if the principal or those claiming under him pay off the incumbrance, they can have no equity against the surety.

If we are right in this, and her equity of subrogation is established, she may enforce that right in any of the modes provided by law or chancery, provided she does not materially prejudice the rights of the principals.

III. If the orators have any right of subrogation they derive that right from Gaius R., and that right is an equitable, and not a legal one. But the purchaser of an equitable right purchases *at his peril*, and takes the property burdened with all the prior equities charged upon it. 7 Cranch 34. *Russell v. Clark's Ex.*, 7 Cranch 69.

The orators complain, that defendant held her peace and let them pay part of the incumbrance. This she did because she knew and always insisted, that they ought to pay the whole incumbrance. Had they done this as Gaius R. had agreed, she would have had no occasion to resist partition; no occasion for her suit and levy, and they might have enjoyed their levy however erroneous. But by endeavoring to throw their burdens upon her, contrary to equity and good conscience, they may, when it is too late, become acquainted with the maxim, "*He that asks for equity must first do equity.*"

The opinion of the court was delivered by

ISHAM, J. We are satisfied that this bill was properly dismissed by the chancellor. The deed of Gardner Briggs, and the payment of the purchase money by Fatima Goodenough, vested in her, as her separate property, the land described in the deed. The application of five hundred dollars due to her from the estate of her father, was clearly a payment of that character. The same may be said of the note of two hundred dollars, signed by her and

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her husband, which was secured by mortgage on the premises, and was given to Briggs, for the balance due on the purchase of the land. At the time it was given, she, in equity, stood as the principal, and her husband as her surety. But their relation, as signers of that note, was changed by the arrangement made September 16, 1848, which was effected through the intervention of Samuel Dutton, as trustee. By that arrangement, a life estate to five-eighths of this land was conveyed to Fatima Goodenough, and an estate in fee to three-eighths of the land, and the reversion of the five-eighths was conveyed to her husband, Gaius R. Goodenough. For this property, he assumed the payment of that note. From that time, he became the principal, and she stood as his surety. For the payment of that note, her separate property, as well as that which had been conveyed to her husband, was mortgaged, and held as security by the creditor; but *as between them, the charge rested upon the property alone, which had been conveyed to him.*

The plaintiffs, in taking the interest of Gaius R. Goodenough, in the land conveyed to him, on their executions, could only take the same, subject to the incumbrance of the mortgage to Briggs, and treat that incumbrance as resting upon that portion of these premises. This is emphatically true, if they had knowledge of the arrangement between Fatima and her husband, and that the conveyance of the premises, on which their executions were levied, was made to him for that purpose; for it is a general principle, that when one takes the title of land with notice of a prior equity, he holds the same subject to that equity. That Samuel Dutton, of the firm of Dutton & Clark, had actual knowledge of that arrangement, clearly appears in the case. He was the trustee through whom the arrangement was made. He, therefore, knew that the Briggs' mortgage was for Gaius R. to pay; that the property which he and the other creditors had taken, was conveyed to Gaius R. for that purpose, and that Fatima and her property was thereby to be relieved from any further liability on that mortgage debt. This notice to Dutton, was notice to Clark, his partner. *Barney v. Curren*, 1 D. Chip. 315. If the other creditors have such a joint interest with Dutton & Clark, as will enable them to join in the prosecution of this bill, it would on the same principle equally seem to follow, that notice to one should be treated as notice to all; certainly, ~~they are~~ not permitted in this suit to deny such a joint

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interest; for if their interests are distinct and several, they cannot join, and this suit, on either ground, is defeated. Comp. Stat. 208 § 3. Aside from this consideration, they had the means of obtaining notice of all the facts in the case, they were put on inquiry, and that is equivalent to notice, and will charge them with the consequences of actual knowledge. *McDaniels v. Flower Brook Man. Co.*, 22 Vt. 274. *Harper v. Rives*, FREEMAN'S Ch. R. 823.

If these plaintiffs are chargeable with notice of the equity resting upon the land on which their levies were made, there is no propriety in saying, that because their levies have proved defective, they can sustain this bill, and compel Fatima Goodenough to repay the money which they had advanced, for the purpose of removing the incumbrance on the land on which they had levied their executions. That portion of these premises, redeemed by that payment, did not belong to her; she had no interest in them, except to indemnify her as surety; neither did they come into her hands as a consequence of that payment. But on the contrary, when that incumbrance was removed, and the levies proved defective, the title of the land unincumbered was in Gaius R. Goodenough. He was the person directly benefitted by that payment of the plaintiffs, as the money was applied in payment of a debt which he was primarily obligated to pay. If an obligation rests upon any one to repay the plaintiffs the money advanced by them, it would seem to rest upon him, rather than upon the defendant.

Fatima Goodenough and her husband were divorced in February, 1850. The equity of redemption on the mortgage given to Briggs, expired under the decree of the chancellor, on the 28th of April, in the same year. The neglect of Gaius R. Goodenough to pay the amount of that decree caused an entire failure of the consideration for which the property was conveyed to him, and imposed upon Fatima Goodenough, the necessity of making the payment of \$165,30, to discharge her liability as surety on that note, and to relieve her property from forfeiture under that decree. The balance due on that decree was paid by these plaintiffs as creditors of Gaius R. to redeem the property levied upon by their executions. On the payment of that money by Fatima, after her divorce, she became a creditor at law of Gaius R. Goodenough, and was at liberty to adopt either of two courses to obtain the repayment of the money she had advanced. In the first place, she had

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the right, by subrogation, to the remedies and securities in the hands of Briggs, as mortgagee, to compel the payment of the amount from Gaius R. Goodenough, or from those claiming under him. Whatever rights the mortgagee had to compel payment of the debt to him, she too is entitled to obtain the re-payment of the same she has advanced. In the second place, the payment having been after her divorce, she had the right to prosecute Gaius R. for money paid, and levy her execution upon his property for its satisfaction. If she had adopted the first course, it is clear, that she could have enforced a foreclosure, not only against Gaius R. but all these plaintiffs, upon all the property included in the deed of Samuel Dutton; even if the levies of these plaintiffs had been good. In that event, they probably might have redeemed by paying the whole mortgage debt, but they would have had no claim against Fatima, on her property; for as to her, they have only paid what should have been paid by Gaius R. or those claiming under him. The rights, and equity of Fatima Goodenough, are none the less, because the levies of their executions have proved defective. That circumstance, whatever may be its effect as to Gaius R., can have no effect upon Fatima Goodenough. In commencing her suit at law and levying her execution upon a portion of the premises belonging to Gaius R. Goodenough, she has taken only a part of that to which she would have been entitled by subrogation, and her legal and equitable right to hold the same in satisfaction for the money she has advanced, is as great in one case as in the other. The truth of the case is really this. After Fatima Goodenough had paid that money in discharge of that incumbrance, she stood as the creditor of Gaius R. Goodenough to that amount. These plaintiffs having paid their money for the same purpose, it is possible, in equity at least, that they can be treated as creditors also; for in each case the money has been applied in payment of a debt which was for Gaius R. to pay. Under such circumstances, Fatima had a right to secure her debt on property belonging to Gaius R.; and having done so, she is not only the first in diligence, but the first in right.

There is another circumstance in this case affecting the equity of the plaintiffs' claim. The execution of Fatima Goodenough, was levied only upon the land lying in the town of Brattleboro, leaving all that portion of the premises lying in Guilford, which was included in the deed of Samuel Dutton, still in the hands of Gaius R.

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Goodenough. This land it appears from the deed of Gaius R. to Benjamin Stevens, and from the bill, has been conveyed for the benefit of these plaintiffs; and they now hold the same for that purpose. There is no propriety in saying, that they may hold the premises conveyed to them by that deed, and also claim from Fatima Goodenough, the re-payment of the money they respectively advanced. Whether the plaintiffs have a claim in equity for the re-payment of that money, against Gaius R. Goodenough, we are not called upon to decide. We think they have no such claim against the defendant.

The decree of the chancellor is affirmed.

J. & J. H. PECK & CO. v. JOHN MERRILL, AND R. PAGE, N. LOVEWELL, M. SAWYER AND G. TAPLIN, TRUSTEES.

Assignment. Statute of 1843. Trustee Process.

The act of 1843, prohibiting general assignments, should be construed so as to be confined to such transfers of property as are made in trust for creditors.

And a transfer by a debtor of all his property does not make of itself what is termed a general assignment, unless it also be conveyed to trustees, to be held by them in trust for other creditors.

And if a debtor conveys his property directly to creditors or sureties for their benefit, and no trust is created for others, the transfer must then be regarded as a mortgage or pledge of personal property; and in such case, the creditor or surety cannot be held as the trustee of the debtor, unless there is a surplus left in his hands, after discharging his claim against or liability for the debtor.

Questions arising as to the manner, in which the disclosure of the trustee was obtained, or in which the examination was conducted, as well also as the motion to recommit, are matters resting in the discretion of the county court, and are not revisable on exceptions.

BOOK ACCOUNT, in which the said Page, Lovewell, Sawyer, and Taplin, were summoned as the trustees of said Merrill, the principal debtor. The book account between the plaintiffs and defendant, Merrill, was referred to an auditor, who returned a re-

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port in favor of the plaintiffs, and judgment was rendered thereon, according to the report, for the plaintiffs.

At the June Term, 1853, of the Orange County Court,—COLLAMER, J., presiding,—before the hearing between the plaintiffs and trustees was commenced, it was shown to the court by the plaintiffs, that at the first meeting of the parties before the commissioner, who had been appointed to take the disclosures, which meeting was June 1, 1851, an examination of the trustee, Page, was commenced by plaintiffs, and the commissioner wrote down his statements, given in answer to the plaintiffs' interrogatories. After proceeding a time in the examination, it was ascertained that he could not complete the disclosure until examination of books &c., by the trustee had been made, and therefore a continuance was taken, that the trustee should prepare and present a general disclosure, with schedules and accounts showing the state of his trusts. At the next meeting before the commissioner, he presented the disclosure on file, and signed by J. W. D. Parker as his counsel, and thereupon the examination by the plaintiffs proceeded. The plaintiffs' counsel insisted that said first proceeding should be returned by the commissioner as part of the examination, but the trustee, Page, declined to make oath to the said first part of his examination; and the commissioner expected and intended to return the same, but the same has not been found or returned by him. The plaintiffs moved to suppress the whole proceeding, reported by the commissioner. The court overruled the motion, to which decision of the court the plaintiffs excepted.

The court then proceeded with the hearing upon the disclosures which were returned by the commissioner, and given by the trustees severally, and the exhibits, vouchers, books, &c, therein referred to, and found the facts in the disclosures as therein stated, and *pro forma* adjudged that the trustees were not chargeable, and dismissed them.

The plaintiffs excepted to the decision of the court so finding the facts, and adjudging the trustees not chargeable and dismissing them.

(The trustees disclosed that the property transferred and conveyed to them by the principal debtor was transferred and conveyed directly to them, for indebtedness to them, and to secure them for liabilities incurred as sureties for the said principal debt-

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or, and nothing would be left in their hands, after discharging his liability and indebtedness to them.)

The court also allowed exceptions of the plaintiffs, at the January Term, 1853, taken to a judgment of the court, overruling an objection to the acceptance of the disclosures, which were returned by the commissioner.

The said Merrill, in his assignment to the said trustees, after setting forth that the goods in the store in Corinth, have been attached, and that said trustees had signed certain notes, as sureties, &c., proceeds: "now to secure them for their said liability, I hereby turn over and deliver to them, by these presents, for the benefit of all and each of them, at their free disposal, all my property and interest in said goods and merchandize, at E. Corinth, subject to said attachments, and also all the goods, wares, and merchandize, in the store at South Bradford, of every name and sort;" and after directing the receiptors and his clerks to deliver over the same to the said trustees, the assignment concludes as follows: "for the purposes herein declared, free from any claim or demand of mine. Aug. 9, 1851."

The said Merrill also, for the same purpose transferred his notes and accounts, and mortgaged his real estate to said Page, Lovewell, Sawyer and Taplin.

W. W. Peck and R. McK. Ormsby for plaintiffs.

The assignment was void under the statute of frauds. Comp. Stat. 548 § 23; and under the act of 1843, against general assignments.

First, it is void under the statute of frauds.

1. The statute embraces two classes of contracts as fraudulent; that in which the fraud is one of moral intent, fraud in fact; and that in which the fraud is one only of legal construction, fraud in law. The present case belongs to the latter class.

2. An assignment which creates a trust for the assignor or empowers the assignee to sell on credit, is invalid. The trust by reserving to the assignor control over any portion of the property, so far perverts it from its appropriate office. It is immaterial whether the reservation be of a specific portion or of the residuum; or if of the latter, whether it be a general reservation or expressed to be for uses to be declared thereafter.

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The power to sell on credit hazards a waste of the fund, and enables the assignee, indefinitely and at will to defer the time of payment. Each tends to avoid satisfaction of debts, and thus debts themselves. *Again*, as a contract, the validity of which depends upon the statute of frauds, and which is disfavored by law, it must upon its face, *affirmatively and clearly* show itself clear of the statute. No presumptions will be made in its favor. If open to a dubious interpretation, every intendment will be made against it.

3. The present assignment was made under insolvent circumstances.

While the real and personal property were under attachment, Merrill mortgaged the one, and transferred the other with his notes and accounts to the trustees, to secure them as his debtors and sureties, and with power to convert the personal property into cash, and apply it in payment of the debts, on which they were so liable. The transfers are to be treated as one transaction, and its import *prima facie* is, that the property was not available to him in his own hands, for the payment of his debts; therefore that he was in "insolvent circumstances."

4. The assignment of Aug. 9, 1851, was more than a pledge. A transfer leaves in the pledgor the general property of the thing pledged, and confers upon the pledgee a possessory title alone, the power of detention until performance of the obligation without the power of disposition.

Again, the power of unrestricted disposition or sale is *ex vi termini*, a power to sell on credit, because it *embraces* that power; but an authority to *sell only for cash* would not be an unrestricted power of sale. A different construction would be a direct violation of the import of the instrument.

It is not necessary in order to vitiate the transfer as one containing the power to sell on credit, that the authority be conveyed in terms. It is the *power itself* not the *form in which it is conveyed*, which raises the objection under the statute. That, as a statute of frauds looks *behind the form to the substance*, otherwise it could always be evaded by the mere choice of language.

The following authorities show that it is sufficient if the power has in fact been conveyed. *Hopkins v. Roy et al. & Trustees*, 1 Met. 79. *Neally v. Ambrose & Trustees*, 21 Pick. 185. *Nicholson*

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et al. v. Leavitt et al., Hunt's Merch. Mag., Nov. 1853. *Meacham v. Stearns*, 9 Paige. *Woodburn et al. v. Mosure et al.*, 9 Barb. 255.

The present case is in substance the same as *Woodburn v. Mosure*.

In the present case a full or unrestricted power of sale, is a power to sell *whenever they shall choose to*; hence to defer selling indefinitely. *Barney v. Griffin*, 2 Comstock 365.

The assignment creates a trust for the benefit of the assignor. An assignment for a part only of the debts, containing simply the power of sale, necessarily creates a trust for the assignor. *Dana's Admr. v. Lull*, 17 Vt. 393. *Grover v. Wakeman*, 11 Wend. *Goodrich v. Downs*, 6 Hill 488. 2 Kent's Com. 533, 536, and notes.

The counsel, among other things, insisted, that the trustees could not charge the property for expenses or services. And cited upon points raised in argument, *Hyslop et al. v. Clark et al.*, 14 Johns. 458. *Briggs v. Murray*, 2 Johns. Ch. 5 Johns. Ch. 328. 11 Wend. 187. *Harris v. Sumner*, 2 Pick. 129.

J. W. D. Parker and Peck & Colby for trustees.

1. The arrangement between Merrill and trustees was a *pledge* or *mortgage* of the property. It was not an assignment within the meaning of the act of 1843, nor within the principle of Dana's case. (17 Vt.) The transfer was *to the creditors*, to indemnify them against liability assumed for Merrill, and for their sole and exclusive benefit. It has never been held that when a transfer has been made directly to the creditor for his security, that the transaction was *void* because the surplus, if any, was not to be distributed among other creditors. Such a rule, if carried out, would avoid a mortgage or conveyance of real estate, if it did not provide, that after satisfying the claims of the mortgagee, the balance should go to other creditors. *Meredith Man. Co. v. Smith*, 8 N. H. 347. *Lowe v. Wyman*, 8 N. H. 586. *Henshaw v. Sumner*, 23 Pick. 446. *Sargent v. Webster*, 18 Met. 497. *Barker v. Hall & Trustees*, 13 N. H. 298. *Litch v. Hollister*, 4 Comstock 211. *U. S. v. McLellan*, 8 Sumner 354-5. *Blanchard v. Dias*, 10 Paige 445-8. *Same v. Same*, 1 Comstock 201, 204.

These cases make a marked distinction between assignments

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directly to creditors themselves, and general assignments in trust for the benefit of creditors. Conditions and reservations which would avoid the latter, may be introduced into the former without impairing their validity. Thus it was held in *Litch v. Hollister*, (4 Comstock 211, 216,) when property was transferred to a creditor, as security for his debt, and the surplus was reserved to the debtor, that this reservation did not affect the validity of the transfer.

It is to be remarked that in this case, the transfer of the property was not a *voluntary* act. It was made on the pressure of the trustees. An assignment made under such circumstances is *valid* under bankrupt laws. *Cook v. Pritchard*, 6 Scott N. R. 34. *Same Case*, 5 Man. & Gr. 329. *Ogden v. Stone*, 11 Mees & W. 494. *Kynaston v. Cranch*, 14 Mees & W. 266. *Ogden v. Jackson*, 1 Johns. R. 370. *Phoenix v. Jugubaus*, 5 Johns. R. 412.

2. There being no fraud in fact, trustees should be permitted to hold the property to indemnify them against their liabilities. Comp. Stat. p. 268 § 51, 52. *Grant v. Shaw*, 16 Mass. 341. *Ripley v. Severance*, 6 Pick. 478.

The opinion of the court was delivered by

ISHAM, J. The plaintiffs having obtained judgment against the principal debtor, the inquiry now arises as to the liability of the trustees on their disclosures. That question depends upon the validity of the written assignment, or transfer of property, which was made by John Merrill, to these trustees on the 9th day of August, 1851, for the purpose of securing them on various liabilities, which they had assumed for him. That instrument as well as the several mortgage deeds, executed by Mr. Merrill, on the 6th and 9th of August, of his real estate in the towns of Corinth and Bradford, should be considered and treated as one instrument, as they were evidently made for the same object, and designed to carry into effect one and the same transaction. It is equally obvious also, that all the property both real and personal, owned by Mr. Merrill, was intended to be, and was in fact, conveyed to these trustees, not only for their security, but from the avails arising from the disposition of the property, to satisfy and pay the several debts, for which they had become liable as his sureties.

If the title of these defendants to that property, under this

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transfer is valid, it is not pretended that they are chargeable as trustees; for the property is insufficient to pay the debts for which they were liable. But if that transfer is fraudulent, either in fact or in law, or if for any cause, it is ineffectual to convey the property, for the purpose for which it was made, then these defendants are trustees, and are liable as such to the plaintiffs.

It is insisted that this transfer is fraudulent and void, at common law, as a general assignment, and that it is also void under the act of 1843, which provides "that all general assignments, hereafter made by debtors for the benefit of creditors, shall be null and void, as against the creditors of said debtors." We are not called upon in this case, to investigate the principles at common law, in relation to general assignments, or ascertain what provisions, on the face of the instrument, will render it void; for if this transfer is to be regarded as a *general assignment*, the statute itself declares it void. Previous to the passage of that act, general assignments had been sustained by repeated decisions of this court. The practice very generally prevailed, in case a debtor became insolvent, or so embarrassed as to be in danger of having his property attached by his creditors, to make an assignment of all his property to *some person in trust* for preferred creditors, who should become parties to the assignment, and then for the benefit of his creditors generally. *Hall v. Denison*, 17 Vt. 311. The evils arising from such assignments are referred to by HIRMAN, J., in *Beers v. Lyon*, 21 Conn. 610, in which he says, "that assignments were frequently made to the confidential friends and connections of the assignor, and the property kept by the trustees for their personal use, but more generally for the use of the assignor. The difficulty of making even responsible trustees account to the creditors was so great, as usually to prevent their attempting it; and it was of course never attempted, in the more common case, where the trustees were not responsible." The same evils resulting from general assignments, are mentioned by WOODS, J., in *Barker v. Hall*, 13 N. Hamp. 301, and were none the less seen and felt in this state. The design of the statute of 1843, was to avoid those evils by prohibiting transfers of that character. It was not intended to affect other modes of transfer from which those evils did not arise. In giving a construction to this act, therefore, the prohibition should be confined to transfers of

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that character, and should not extend farther than to furnish a remedy for the evils which were found to exist. If this transfer had been made by Mr. Merrill, to these defendants, in trust for other creditors, or for themselves and others, it would have fallen within the letter and spirit of the act, as being a general assignment. But this instrument is not one of that character. From its general provisions it is evident, that no such transfer was intended by the parties. The property is transferred to these defendants directly, by Mr. Merrill, to secure them for liabilities which they had assumed for him, with the right of its disposition for the purpose of satisfying those debts. Some of those liabilities were assumed at the time of the transfer; others were assumed to relieve the property from prior liens, which rested upon it. For those liabilities, and those previously assumed at various banks, this transfer was made at the solicitation and requirement of these defendants.

This instrument, under these circumstances, is effective, and operates as a mortgage of this property for their security. These defendants took the same as mortgagees, having a specific lien on the property with the right of its disposition for the payment of those debts, and are liable to account for the same in that manner, and for the surplus, if any, to Mr. Merrill. This is a liability which the law creates, and will enforce, whether such provisions are expressed on the face of the instrument or not. *Wood v. Dudley*, 8 Vt. 435.

A transfer of that character is not within the statute of 1848, nor is it affected by any of the rules existing at common law, regulating general assignments. If this transfer is to be regarded as a general assignment, and void under that statute, it would be impossible, so long as the statute remained in force, for a creditor to take security for his debt, or for any liability which he might assume. Such a change in existing laws, and mode of doing business, could never have been intended by the legislature. It would, as observed by the court in *Barker v. Hall*, "be extremely unreasonable legislation, to defeat all conveyances by the voluntary act of the debtor, having for their object the fair security of a particular debt, and thereby giving preference, when at the same time, it authorized the creditor to obtain security and preference compulsory, by an attachment on legal process." The au-

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thorites in treating transfers of this character, valid as mortgages, are very decisive, and we think are founded on correct principles.

In the case of *Meredith Man. Co. v. Smith*, 8 N. Hamp. 347, it appeared that the debtor had transferred to a deputy sheriff, his account books, to satisfy various claims on which the sheriff had several writs, for service on the debtor's property, and who had assumed a liability for those debts to the creditors, by his neglect to serve the writs. It was insisted that the transfer of those claims was void under the act of 1834, which provided, that no assignment made for the benefit of creditors, shall be valid unless it provides for an equal distribution among his creditors. It was held, that the transfer was valid, and that it was competent for a debtor, to appropriate a portion of his property for the payment of particular debts, as the same result might have been accomplished by an attachment. The only difference between that case and the one under consideration, is this, that in that case the transfer was of a part of the debtor's property, while in this it was of all. In the case of *Law v. Wyman*, 8 N. H. 586, it was held, that a pledge or mortgage by a debtor of *all his property* to secure the payment of a particular debt, was not an assignment within the meaning of the statute of July 5, 1834. The court remarked "that the assignments intended by the statute are general assignments, purporting to convey *all the debtor's property to trustees* for the benefit of all his creditors who will become parties to the assignment, and assent to the terms upon which it is made. "The statute could never have been intended to embrace a *mortgage or a pledge of any or all of a man's property* for the security of a particular debt. A debtor has an undoubted right to convey *all his property to one of his creditors* in satisfaction of his debt. The statute was not intended to prohibit such a preference." In the case of *Barker v. Hall*, 18 N. H. 298, it was also held that a mortgage by a debtor of *all his property to secure the payment of a portion of his debts*, leaving others unprovided for, is not an assignment within the statute of 1834; and that the mortgagee was not liable as the trustee of the mortgagor. The court in their opinion referred to the two cases from the 8 N.H. 347, 586, and observed "that we see no reason to question the propriety or soundness of the decisions upon this subject to which we have referred."

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The same doctrine is sustained in Massachusetts. In the case of *Henshaw v. Sumner*, 23 Pick. 446, an insolvent debtor assigned and conveyed certain goods to some of his creditors to pay the debts severally due them, and to indemnify them respectively against their liabilities for him. This transfer was made subject to a previous one of a similar character to George W. Pratt and other creditors. Both instruments gave an express authority to sell the property, and after the payment of the debts, the surplus was to be accounted for to the debtor. The court remarked that the case "was the ordinary one of two successive mortgages of the same property, by an insolvent debtor, to different creditors, to secure their respective debts." It was held that the transfers were valid, and that the property could be held by the assignees notwithstanding the statute of 1838, which provided that no assignment or conveyance made by an insolvent debtor to assignees or trustees for the benefit of creditors, shall be valid against creditors, unless the transfer gave to each of the creditors who shall become parties to it, an equal share without any preference. If those successive transfers were general assignments, they would have been void under the statute; but as mortgages to the creditors themselves, they were held valid and not within the prohibition of the statute. In the case of *Sargent v. Webster*, 18 Met. 497, it was held "that the directors of an insolvent corporation have authority to convey *all the property of the corporation to one of its creditors*, upon condition that he shall apply the property to the payment of his claim, and pay over the surplus, if any, to the treasurer of the corporation; and that such conveyance is not fraudulent, as against other creditors, by reason of its tendency to give a preference. In the case of *Bouchaud v. Dias & Freeman*, 1 Comstock 201, insolvent debtors as partners, transferred *all their property* to the amount of \$80,000, to a creditor to pay a debt which they owed him of \$6,878; and to pay notes and custom-house bonds which the creditor had signed as surety for the debtors to the amount of \$30,626. No provision was made for the payment of any other debts; and after the payment of those debts, the surplus of the property was to be accounted for to the debtors. The act of Congress passed in 1799, provides that when a person insolvent, makes a voluntary assignment for the benefit of creditors, that preference shall be given to debts due the United States,

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and that those debts shall be first paid. If the transfer by the insolvent in that case of all his property made a general assignment, the debts of the United States had a preference. It was held not to be a general assignment, nor within the act of Congress. The court by BRONSON, J., remarked, "that no fair or reasonable construction of the act of Congress will give the government a preference, when the debtor has only assigned his property for the purpose of paying or indemnifying a single creditor or surety." The same doctrine was recognized by STORY, J., in the case of *U. States v. McLellan*, 8 Sumner 345. By statute in New York, all conveyances and transfers, &c. in trust for the use of the person making the same, is declared to be void as to creditors, (2 R. S. § 1.) In the case of *Litch v. Hollister*, 4 Comstock 211, an insolvent debtor assigned a chose in action to certain of his creditors for the purpose of securing their demands, reserving the surplus to himself. It was held "that neither the principle nor the statute applies where the assignment is to creditors themselves for the purpose of securing their particular demands." Such a transfer, "whatever may be its form, is in legal effect only a mortgage, and creates but a specific lien on the property assigned. The residuary interest of the assignor may be reached by legal process, or bill in equity, according to the nature of the interest or of the property."

It is evident from the authorities, that the transfer by a debtor of all his property does not of itself make what is termed a general assignment, but it must also be conveyed to trustees, to be held by them in trust for other creditors. If it is conveyed directly to creditors or sureties for their benefit, and no trust is created for others, the transfer is then to be treated as a mortgage or pledge of personal property. In such case, there is no more impropriety in taking a lien on the whole of the debtor's property, than upon a part, provided there is not an unreasonable disproportion between the value of the property, and the amount of the debt. This, we think, is the character of the transfer made by Mr. Merrill, to these defendants. The transfer was made directly to them as sureties; no debts were to be paid by them except those due to them, and for which they were liable for him; and no trust was created for the benefit of others. The surplus only can be reached by the cred-

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itors, and as none exists in this case, the defendants are not chargeable as trustees of the debtor.

The exceptions allowed on the acceptance of the disclosures of the trustees, and the refusal of the court to charge the defendants as trustees for the want of disclosures, must be overruled. Without the expression of any approval of the manner in which the disclosures were obtained, or in which the examination was conducted, it is sufficient to observe, that the whole matters embraced in those exceptions, were matters resting in the discretion of the county court, and are not revisable on exceptions. It was discretionary with that court to recommit the matter for further disclosures, or to proceed with the examination in open court, or to accept the disclosures as reported. The disclosures as made and reported, having been accepted by the county court, the matter cannot be reconsidered in this court.

The judgment of the County Court discharging the defendants as trustees must be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
THIRD JUDICIAL CIRCUIT.
SEPTEMBER TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, }
HON. MILO L. BENNETT, } ASSISTANT JUDGES.

JOHN H. PECK v. ASHLEY HIBBARD.

Discharge in Bankruptcy in a foreign country, its effect. Foreign Laws.

A promissory note, made and executed in the province of Canada and payable generally, that is, no specified place of payment being mentioned in the note, is to be treated as a note of that place, and the rights, duties, and obligations, growing out of it, are to be determined by the laws of that province.

And if the maker of the note is regularly discharged as a bankrupt, under the laws of that province, so that such discharge in bankruptcy pleaded in bar, would be a good defense to the note, in that province, then also will that discharge be equally a bar to a suit on the note in this state; and it is immaterial

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whether the maker was domiciled in this state, or in that province, at the time of the discharge; for whatever will be a good defense by the laws of that province, where the note was given and payable, will be a good defense, wherever and by whomsoever the note may be prosecuted.

The note in suit, was indorsed to the plaintiff after the proceedings in bankruptcy had been commenced in Canada, and after the note had been presented and allowed under those proceedings: this would place the claim within the jurisdiction of the court in that province; and it is not competent for a party to defeat the operation of those laws, by a subsequent indorsement of the note to a citizen of another country; and the plaintiff, as indorsee, took the note, subject to every defense existing against his immediate indorsers; and the discharge in bankruptcy pleaded in bar was held to be equally a defense to this suit, whether we apply the rule applicable to a foreign discharge in bankruptcy, or the rule applicable to a discharge under state insolvent laws.

The laws of a foreign country must be stated in the plea and proved as facts.

ASSUMPSIT upon a promissory note.

The defendant pleaded several pleas in bar, to one of which the plaintiff replied specially; to which replication the defendant demurred. The facts in the case sufficiently appear in the opinion of the court.

The County Court, September Term, 1852,—POLAND, J., presiding,—*pro forma* adjudged the replication insufficient, and rendered judgment for the defendant.

Exceptions by the plaintiff.

W. W. Peck for plaintiff.

I. The claim being negotiable paper, the plaintiff not a citizen of Canada, when he purchased, and having purchased for value and without notice of the bankrupt proceedings, is not affected by the discharge. His non-residence exempted him from their jurisdiction, and the fact that the note was past due when he received it, was not notice of the existence of the proceeding, the discharge not having been then granted. Had he taken with notice, he might be bound by acquiescence. *Baker v. Wheaton*, 5 Mass. 509. *Watson v. Bourne*, 10 Mass. 337. *Braynard v. Marshall*, 8 Pick. 174. *Ogden v. Saunders*, 12 Wheat. 362-3. *Blackman v. Green*, 24 Vt. 17.

II. The law under which the discharge was obtained, was passed after the contract was made, and the discharge impaired the obligation of the contract.

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Such laws are repugnant to our institutions; discharges under them are recognized in our courts, if at all upon the ground of comity alone; comity never prevails against the policy of law, which exists in the jurisdiction, wherein the discharge is plead, and which is foreign to that wherein it was obtained.

If the plaintiff will be taken to have had constructive notice of the proceedings, when he received the note, and to have assented to them, they would not bind him being a nullity. *Kimberly v. Ely*, 6 Pick. 440. *Agnew v. Platt*, 15 Pick. 417.

III. If the replication is insufficient, the pleas are bad in substance. The act under which the supposed discharge was obtained, being foreign should have been recited in the pleas, and the steps taken under them averred; so that it might be seen from the pleas that there were such acts and that the steps averred to have been taken under them were duly taken; and that the plaintiff traverses the existence of the acts. Gould's Pl. Chap. 3 § 16.

The pleas merely state that there were such acts, but do not set them forth. The validity of the proceedings averred to have been taken under them cannot be seen.

Smalley & White for defendant.

It is a general rule that a discharge from a contract, according to the law of the place where it is made, or where it is to be performed, is good every where and extinguishes the contract. *Hempstead v. Reed*, 6 Conn. 480. *Hicks v. Brown*, 12 Johns. 142. *Baker v. Wheaton*, 5 Mass. 509. *Potter v. Brown*, 5 East 124. *Matthews v. Bush*, 16 Johns. 233. *Sherrill v. Hopkins*, 1 Cowen 103. *Blanchard v. Russell*, 18 Mass. 1. *Watson v. Bourne*, 10 Mass. 337.

Whether between citizens, or between a citizen and a foreigner, or between foreigners. Story's Conf. of Laws 281 § 340. 5 East 124. 13 Mass. 1. 1 Cowen 103. 12 Johns. 142, above cited.

There are however some cases, in which a more limited doctrine would seem to be laid down. 5 Mass. 511. 10 Mass. 337. Story's Conf. of Laws 281 § 340; 284 § 343; 285 § 344; 345 § 346.

But the doctrine of these cases does not affect this case; for it is wholly inapplicable to contracts and discharges in foreign coun-

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tries, which must be decided upon principles of international law. Story's Conf. of Laws 288 § 341.

And in the 8 Pick. 197, it would seem that if the application for the benefit of the law, had been made before the transfer of the note, had been made (as in this case) the cause would have been decided differently.

This contract was made in Canada, between citizens and parties of and in Canada, and the *lex loci* became a part of the contract the same as if the law had been spread out upon the face of the contract. 16 Johns. 249, 250 and 251. 1 Cowen 107 and 108.

When the plaintiff took this note of Pierce & Son, his indorsers, it was over due about two years, and he acquired no more rights than they then had in the note. He took it subject to all the objections and equities to which it was liable in the hands of his indorsers, Pierce & Son. Bayley on Bills 82, and notes.

The opinion of the court was delivered by

ISHAM, J. The questions in this case arise upon a demurrer to the replication. The action is in *assumpsit* on a promissory note dated March 18, 1848, executed by the defendant and his copartner, and delivered to the payee at Montreal, in the province of Canada, in which place the makers and payee resided. The defense rests upon the validity of a discharge in bankruptcy granted by the courts in that province, which is set forth, with the proceedings under which it was obtained, in the special pleas in bar. From the facts admitted by the demurrer, it appears that the note was indorsed by the payee to James & Co., and by them to Messrs. Pierce & Son, all of whom were residents of that province, and that while the note was in their hands, it was presented to, and allowed by the court under the proceeding in bankruptcy. It also appears that before the defendant's final discharge, and after the note had matured, it was transferred in this state, for a valuable consideration, to the plaintiff, who was a citizen and resident of this state, and ignorant that any proceedings in bankruptcy had been commenced, or that any defense whatever existed to the note. The general question arises, whether the defendant's discharge is a bar to this suit.

The note, is *payable generally*, that is, no specified place of payment is mentioned. It is therefore to be treated as a note of that

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place, and the rights, duties, and obligations growing out of it are to be determined by the laws of that province. This rule, in relation to notes payable generally, is given and sustained by Justice STORY in his *Conflict of Laws* § 278, 317, 332, 343, in which he observes, "that a note made in France, and *payable generally*, will "be treated as a French note, and governed accordingly by the "laws of France, as to its obligation and construction." In the case of *Ory v. Winter*, 16 Martin's R. 277, the Supreme Court of Louisiana sustained the same doctrine, as held by Justice STORY, and held that when a negotiable note was made in one state, and was indorsed in another state to a citizen of the latter, the contract was governed by the law of the place where the note was given and not by the law of the place where the indorsement was made. The court observed that, "we see nothing in the circumstance of the "rights of one of the parties being transferred to the citizen of another state which can take the case out of the general principle." This rule was considered as the settled law of England and America. *Slocum v. Pomeroy*, 6 Cranch 221. 9 Barn. & Cress. 208. *Blanchard v. Russell*, 18 Mass. 4. *Smith v. Mead*, 3 Conn. 255. *Sherrill v. Hopkins*, 1 Cow. 103.

In the case of *Braynard v. Marshall*, 8 Pick. 174, a different rule was adopted. It was there held that a note *payable generally* was payable anywhere; so that if a note was made in one country and payable generally, and was indorsed to a citizen of another country, it is to be treated as payable to the indorsee, and as a note of the country where he was domiciled, and not subject to any discharge obtained under the laws of the country where it was executed. That case appears also to have been subsequently recognized in *Savage v. Marsh*, 10 Met. 594. In relation to the case of *Braynard v. Marshall*, Justice STORY has remarked, "that it is "difficult to perceive the ground upon which the doctrine of that "case can be maintained as a doctrine of public law, and that it "has never been propounded in any common law authority, nor "ever been supported by the opinion of any foreign jurist." *Conflict of Laws* § 344, 345. The soundness of this principle seems to have been demonstrated by him in his treatise on *Conflict of Laws*, on a review of the authorities both English and American, as well as foreign. We must regard this note, not only as having been executed, but *payable in the province of Canada*; as much

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so, as if a particular place of payment in that province, had been designated in the body of the note.

The regularity of the proceedings under which the defendant obtained his discharge has not been disputed; nor have the general provisions of the several acts of the provincial Parliament, been denied, that in that province, the bankrupt is discharged from all claims which were proved, or proveable under the commission. We entertain no doubt, that if this defendant had been prosecuted on this note in that province by the payee, or by the indorsees resident there, the discharge in bankruptcy which is pleaded in bar, would be a good defense. We are satisfied also, that the discharge is equally a bar to the claim of this plaintiff on the note; and that it is immaterial, whether he was domiciled in this state, or in that province at the time of the discharge. Whatever will be a good defense, by the laws of that province, where the note was given and payable, will be a good defense, wherever and by whomsoever the note may be prosecuted.

This rule depends upon those principles of comity which one nation is bound to apply towards the laws of another, when they are brought into question. It is in no way affected by the provisions of our constitution, or of any policy which may arise from the mutual relation existing between these states. Justice STORY's Conflict of Laws § 279, 340, says, "that the general rule is equally well settled, that a defense which is good by the law of the place where the contract was made, or was to be performed, is of equal validity in every other place, where the claim may be prosecuted, whether it operates *between citizens of that country, or between a citizen and a foreigner, or between foreigners.*" In the case of *Green v. Sarmiento*, 1 Peter's C. C. R. 74, Justice WASHINGTON observed, "that the law of the country where a contract is made is the law of the contract, wherever performance is demanded, and that the same law which creates the charge will be regarded, if it operate a discharge of the contract." Ch. KENT, 2 Kent's Com. 574, has remarked, "that the discharge of a debtor under the bankrupt or insolvent laws of the country where the contract was made, and in cases free from partiality and injustice, is a good discharge in every other country and pleadable in bar." In *Smith v. Mead*, 3 Conn. 253, this doctrine was recognized and applied in an action on a note executed in Canada and payable gen-

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erally, though the parties were residents in New York. This point in the case has not been questioned, whatever may have been done in a question arising on a construction of our constitution. *Harrison v. Edwards*, 12 Vt. 651. *D'Soby v. D'Laistree*, 2 Har. & John. 198. The authorities in England are uniform in the adoption of the same rule. It was so held by Lord MANSFIELD, in *Ballentine v. Golding*, and by Lord ELLENBOROUGH, in *Potter, v. Brown*, 5 East 124. In that case, the debt was contracted in Maryland, where the defendant resided, and his discharge under the bankrupt law of this country passed in 1800, was held valid against the plaintiff, though his residence was in England. That case has been considered as having settled the law in the English courts, and is a decisive authority in sustaining the validity of the discharge pleaded in bar in this suit, even if the plaintiff had been the owner of the note at the time it was given, and had his residence in this state.

In the case of *Harrison v. Sterry*, 5 Cranch 289, it was held, that an assignment, under the bankrupt law of a foreign country, cannot of itself operate as a legal transfer of property in this country, so as to prevent an attachment of the same by the creditors of the bankrupt resident here. The principle of that case, however, can have no effect on this question, as that is a mere question of priority, depending upon the law of the place where the property lies, and forms no part of the contract, and in no way determines what shall be a valid discharge of the defendant's liability.

We are satisfied, upon principle as well as authority, that at common law, when a note is executed and payable in a foreign country, and a regular discharge in bankruptcy has been obtained by the debtor resident there, the discharge will constitute a valid defense to the note, wherever the creditor may be domiciled, or wherever the note may be prosecuted. The cases in this country, in which this subject has been considered to any great extent, have arisen under the insolvent laws of the different states. Under those laws, the question has arisen, to what extent such discharges are valid against creditors who were citizens of other states, and who, by no act of their own, have waived their extra-territorial immunity, and submitted themselves or their claim to the laws of that state. Since the cases of *Sturges v. Crowningshield*, 4 Wheat. 122; *McMillen v. McNiel*, 4 Wheat. 209, and *Ogden v. Saunders*,

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12 Wheat. 358, the rule has been generally adopted, that a discharge under the insolvent laws of a state where the contract was made, will not be considered a valid discharge of a debt, if the creditor was a resident of another state. Such laws are considered as impairing the obligation of contracts, when they affect contracts made out of the state, or a citizen not a resident of the state where the discharge is granted. Justice STORY, Conflict of Laws § 841, observed, "that those cases have arisen under the peculiar structure of the constitution of the United States, prohibiting the states from passing laws impairing the obligation of contracts. But in relation to the doctrine of all those cases, he says, it is wholly inapplicable to contracts and discharges in foreign countries, which must, therefore, be decided upon general principles of international law." This difference between the two cases is apparent; for the legality of those acts of the provincial Parliament, and their universality is not affected or limited by that, or any other provision of our constitution. Their binding and universal obligation rests upon those principles of comity, which convenience and commercial relations have introduced and established. Upon those principles, we think, the discharge, granted in the country where the note was executed and payable, is a valid defense in this suit.

We are satisfied also, that the result would be the same, if we were to apply to this case the rule adopted in this country, in relation to discharges under state insolvent laws. In the case of *Braynard v. Marshall*, 8 Pick. 174, the insolvent's discharge was held inoperative, on the ground that the note was indorsed to the plaintiff, a citizen of Massachusetts, before the defendant's application was made for his discharge under the insolvent law of New York. The plaintiff's right as a creditor, in that case, was perfected before the application was made for the debtor's discharge. PARKER, Ch. J., observed, "that at the time of the defendant's application for a discharge, his creditor was a Massachusetts man, and according to the case of *Baker v. Wheaton*, 5 Mass. 509, the certificate would be no bar to the action." He further observed, "that a note made in New York, and indorsed to a citizen of Massachusetts, before an application for the benefit of the insolvent law, ought not to be discharged under the process provided by that law." It is apparent, from the language of the court, that the discharge would have been operative, if the indorsement had been

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made after the debtor's application for his discharge under that law. That principle will subject this note to the discharge pleaded in bar in this case. The note now prosecuted was indorsed to the plaintiff by Messrs. Pierce & Son, long after the proceedings in bankruptcy had been commenced, and long after the note had been presented and allowed under those proceedings. The presentation and allowance of this note under those proceedings, placed the claim within the jurisdiction and subject to the action of the court in that province; and it is not competent for a party to defeat the operation of those laws, by a subsequent indorsement of the note to a citizen of another country. The discharge would clearly be a defense to a suit brought by Pierce & Son, on the note; equally so is it, to a suit brought by this plaintiff. The plaintiff, as indorsee, took the note, subject to every defense existing against his immediate indorsers. Whether, therefore, we apply the rule applicable to a foreign discharge in bankruptcy; or the rule applicable to a discharge under state insolvent laws, the discharge pleaded in bar is equally a defense to this suit.

Objections, however, have been taken on this demurrer to the sufficiency of the pleas in bar, and it is insisted that they are defective in not properly setting forth the different acts of the provincial Parliament under which the defendant obtained his discharge. These objections, we think, are well taken. The laws of that province are foreign laws, and must be stated and proved as facts. They must be specially set forth in the plea, that the court may judge, whether the statutes, and the proceedings under them, justify the discharge. In this respect the pleas are defective on this demurrer. The case of *Hempstead v. Reed*, 6 Conn. 486, is decisive on this question. The replication being a sufficient answer to the pleas, the judgment of the County Court must be reversed.

On motion, leave to amend was granted, on the usual terms.

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WILLIAM W. TURNER AND CHARLES S. PEASLEY v. CHAUN-
CEY GOODRICH.

[DECIDED IN CHITTENDEN COUNTY, DECEMBER TERM, 1853.]

Covenant of Warranty, Breach of.

In an action of covenant, upon the covenants of warranty, in a deed, if the covenantee have bought in an elder and better title, and which was asserted against him, this is equivalent to an eviction, and is a breach of the covenant.

But in such case the covenantee assumes the risk of proving the title so bought in, to have been elder and better than the title derived from his grantor.

To avoid this hazard, he must have given notice to his covenantor to defend against such title, and waited to be actually evicted, by judgment of the proper tribunal.

In such case, the covenantee is entitled to recover the amount necessarily paid, to buy the outstanding title, with necessary costs and expenses.

ASSUMPSIT on certain promissory notes.

The defendant among other things, pleaded an offset founded on the breaches of covenant, in a certain deed from the plaintiffs to the defendant.

The case was referred under a rule of court to a referee. The question raised and decided in this case, sufficiently appears, without any further statement of the facts, from the opinion of the court.

H. Leavenworth for plaintiffs.

C. Adams for defendant.

The opinion of the court was delivered by

REDFIELD, Ch. J. The question involved in this case is, whether an outstanding title, at the time of entering into a covenant of warranty, which is elder and better than that of the covenantor, and which is asserted by bringing a suit against the covenantee, in possession of the land, and which he is compelled to buy in, to prevent being dispossessed of the land, amounts, in law, to a breach of the covenant. According to the old common

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law, after covenants of warranty came in use, instead of the more ancient feudal remedy, by *warrantia chartæ* an actual eviction was necessary to be shown, in order to a recovery upon these covenants. But that rule is very considerably relaxed in England, as will appear by the cases referred to in the argument of the cases of *Brown v. Taylor*, 13 Vt. 631. *Thayer v. Skay*, 18 Eng. Com. Law 441. *Hackett v. Glover*, 7 Petersd. 157-236. *Smith v. Compton*, 23 Com. Law R. 106.

In the United States the rule has been still farther relaxed. As this covenant is chiefly a covenant for title, but also for quiet enjoyment, it has been held, in this state, that if the covenantee finds some one in possession of the land, he may bring suit, and if he fail to recover, this is *prima facie* a breach of the covenant, without notice to his warrantor to defend the title, and conclusive with such notice. *Brown v. Taylor*, and cases there cited. This is held equivalent to an eviction.

And in the case of *Williams v. Wetherbee*, 1 Aik. 233, it was held, that a final recovery against the covenantee, in possession was a sufficient breach of the covenant of warranty, and that an actual ouster by writ of possession, was immaterial.

We have now the case of a suit brought by one having an elder and better title, and before final judgment the covenantee, to prevent being dispossessed of the land, purchases in the title at a fair rate. This, no doubt, in justice and moral equity, is the same thing as eviction. As the covenant is intended to bind the covenantor, to defend not only the title but the possession, and the rule of damages adopted in this state, is also intended to indemnify the purchaser for the loss of both, it is highly just and proper that he should recover such indemnity, under the covenants of warranty. If the covenantee never takes possession, or if, having taken possession the outstanding title is not asserted against him, he may have full indemnity, by action upon the covenants of seizin. But when he is in possession of the land, and the suit is brought, or the title asserted, in any way, perhaps, whereby it becomes impossible for the covenantee longer to maintain his possession, it is the same thing whether he yields without suit or after judgment, to a writ of seizin and possession, or buys in the outstanding title at a fair rate. Of course, if he yields to a claim of title, without suit, or without judgment, on notice to the covenantor to

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defend his title, he assumes the burden of showing the title, to which he yields, good, and so also if he purchases in the outstanding title; and in either case, he must rebut all possible implication of collusion. But this is matter of evidence, and when established it should, and as we regard the recent decisions, does constitute a breach of the covenants of warranty, and entitles the party to recover the amount paid to obtain the latter, and all expenses necessary in the premises, which must extend to the costs of the suit, while pending, and counsel fees. *Pitkin v. Leavitt*, 13 Vt. 379.

A summary of the cases upon this point will be found in Rawle on Covenants 294, 236, 237, 238, 239, *et seq.*

The author assumes that the American law is fully settled to this extent. The cases in which the law is so decided, or so declared, are as follows: *Clapp v. Coble*, 1 Dev. & Bat. Ch. R. 177. *Sprague v. Baker*, 17 Mass. 590. In this case the outstanding title was in fact a mere incumbrance, and should have been so regarded, probably; but the court held it a breach of the covenant of warranty, as a perfect title, would have been, if asserted and bought in by the covenantee, to save being dispossessed under it. *Patton v. McFarlane*, 3 Penn. 425. *Dickinson v. Vorhees*, 7 Watts & Serg. 409. *Loomis v. Bedel*, 11 N. H. 74. *Brown v. Dickerson*, 12 Penn. 372.

The conclusion of the author, which seems to be fully justified by the cases, is, "That the weight of authority is in favor of the position, that the purchase by the covenantee, of an outstanding paramount title, when that title is actually asserted, will constitute such an eviction, as will entitle him to damages upon his covenants, for quiet enjoyment, or of warranty, measured by the amount he has thus paid," and necessary expenses of course, according to the decisions in this state, and at common law. This rule, as applied to one who has entered into possession, under his deed, is no doubt the true rule, and I have no doubt is fully sustained by the latest and best English decisions, upon this subject.

Judgment reversed, and judgment for plaintiffs, deducting the larger sum found by the referee, and the costs paid in the other suit to both parties, and interest, which were expenses necessarily incurred by defendant in acquiring the title.

Walker, Smith & Co. v. Barker et al.

**WALKER, SMITH & CO. v. CARLOS BAXTER AND CHAMPLIN
FLETCHER.**

Appeal from probate court. Mortgagor & Mortgagee. Merger.

The allowance of demands secured by mortgage, as claims against the estate of the mortgagor, will have no effect to defeat or impair that security, or prevent their being taken into account, in the allowance of such dividends against the estate, as may be ordered by the probate court; for until the claims are fully paid by the mortgagor, or some person having his interest, they stand in the same situation, as other claims allowed against the estate, for which no security by mortgage was ever obtained.

Nor will the purchase of the equity of redemption, by the mortgagee, at a public sale by the administrator of the estate of the mortgagor, merge the different estates of the mortgagor and mortgagee so as to operate as payment or satisfaction of the debts for which the mortgage was given, and this rule will obtain both at law and in equity.

APPEAL from a decree of the probate court, for the district of Chittenden, for the payment to the defendants of a dividend upon the estate of Geo. E. Harrington.

Plea the general issue, and trial by the court, at the March Term, 1852, PIERPOINT, presiding Judge.

On the trial, the plaintiffs introduced in evidence a copy of record from the probate court of the report by the commissioners on claims of said estate, showing an allowance against the estate to the plaintiffs of \$181,76; one to Baxter, of \$3,216,17, on three notes secured by mortgage, which said mortgage, Baxter, at the time of said allowance, declared to the commissioners his intention not to waive by reason of recovering said allowance, as appeared by said report; also an allowance to Fletcher, of \$3,101,-34, on a note.

The plaintiffs also offered a copy of a deed of mortgage from said Harrington to said Fletcher, of certain lots in Burlington, dated July 7, 1849, to secure the note on which said allowance was made to said Fletcher; also a copy of a deed of assignment, dated July 11, 1850, of said land and last mentioned note from said Fletcher to said Baxter; also a copy of a deed of mortgage from said Harrington to William C. Harrington, of the same land and other lands in said Burlington, to secure said three notes, on which said allowance was made to said Baxter, said deed bearing

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date Nov. 21, 1848; also a copy of a deed of assignment, dated December 4, 1848, from said William C. Harrington to said Baxter, of the lands and notes embraced in said mortgage deed; also a copy of a deed of quit-claim from Joseph D. Allen, as administrator of said Geo. E. Harrington to said Baxter, dated August 1, 1850, conveying to said Baxter, for the consideration of two hundred and fifty dollars, all the interest and estate which was in said Geo. E. Harrington, at his decease, in said lands; also a copy of the license from the said probate court to said Allen, to sell said lands; also a copy from the probate court of the license to sell, and of the warrant to the said commissioners.

The defendants were also required on trial, to produce the original deeds, and notes for which the said mortgages were given under notice to produce the same on trial; they admitted the service of said notice, and waived all objections to the introduction of said copies.

It appeared in evidence on the part of the defendants, that after the grant of said license to sell, the administrator advertised the property mentioned in his said deed to said Baxter, and some other real estate belonging to said estate, to be sold at public auction in said Burlington, July 10, 1850; that on the day last mentioned, and at the place advertised for said sale, and before the sale to Baxter, the administrator represented to those present, that there were upon the property advertised for sale, the mortgages herein before described, and the amount due upon the same. That the notes secured by the said mortgages, so assigned to said Baxter, had been allowed against the estate, by the commissioners appointed for the adjustment of claims against it.

That in his, the administrator's opinion, fifty per cent. would be paid upon the said allowance to said Baxter and Fletcher, by dividends from the other assets of the estate, thus relieving said land to that extent. That he, the administrator, guaranteed nothing except the correctness of his proceedings, as administrator of said estate.

It also appeared, from the defendants' evidence, that said Baxter purchased relying upon said representations.

Upon the foregoing facts the county court rendered judgment, affirming the decree of the probate court.

Exceptions by plaintiffs.

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W. W. Peck for plaintiffs.

(1.) The purchase of the equity of redemption by Baxter, worked an extinguishment of the mortgages, and a partial or entire satisfaction of the mortgage debts; and the decree of the probate court was erroneous in ordering distribution of the dividend upon the entire debts, as allowed; and not their residue after deducting the payment received from the land, if there was a residue.

(a.) An *extinguishment*, transpires when a collateral right or interest, and the estate out of which it arises, meet in a person in the same right without an intervening interest. If the collateral right or interest arises by separating the legal and equitable titles, the meeting produces a reunion or restoration; the equitable being extinguished in the legal title, as one cannot be a trustee to himself. 3 Greenl. Cruise 551—57, 586; 2 Mason 581, *Dexter v. Harris*.

At law the rule of extinguishment is uniform. In equity it admits of two exceptions; the one, where the purposes of justice, that is, the rights of the party require that the separation should continue; the other, where it is indifferent to his rights, but is his intention that the separation should continue; that is manifested at the time of the meeting, and is a just intention, that it can be accomplished without prejudice to the rights of third persons.

(b.) In the case of a mortgage, the effect of an extinguishment produced by the mortgagee buying in the equity of redemption must be a partial or entire satisfaction. The pledge has ceased to exist, and has vested absolutely in the pledgee. Unless satisfaction shall be deemed to be the result, and the obligation *pro tanto* discharged, the creditor would be entitled to double payment to the extent of the value of the property. On the contrary, if the mortgagee pays the debt, the mortgagee must restore the property and whatever he has realized from it. All this is upon the principle that in any event he must account for the security. 18 Vesey 883, *Forbes v. Moffat*; 3 Greenl. 260, *Freeman v. Paul*; 24 Maine 332, *Campbell v. Knight*; 18 Conn. 181, *Bassett v. Mason*; 3 Johns. Ch. 53 *Gardner v. Aster*; 6 Ibid. 393, *Starr v. Ellis*; Ibid. 417, *James v. Johnson & Morey*; 2 Greenl. Cruise, 555—57, 586, and notes; 4 Kent's Com. 102—3.

The present case is within the principle. The legal and equitable estates met in Baxter. His rights did not require that the

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mortgages should be kept alive, for there was no outstanding title against which he needed protection; and he evinced no intention to the contrary. To prevent an extinguishment would, upon the above grounds, have worked a fraud upon the other creditors, the mortgagor being dead and insolvent. The case is analogous to that of bankruptcy, where the creditors claim against the common fund, and one or more of them have specific securities besides. Hence the law of marshalment directly applies. Baxter would therefore be deemed *prima facie* to have been paid in full; and if he claimed to come in under the dividend with a residue, he should have shown that the security was inadequate.

(2.) The case stands upon the principle, which governs where the mortgagee obtains an absolute title by foreclosure. That is a union of the two estates in himself; of an application of the security upon the debt. If he still claims to resort to the debtor, he must show that the security was inadequate. A purchase of the equity by the mortgagee of the mortgagor, does not differ in its result. This is an amicable, the other a compulsory application of the security.

(3.) But the purchase was conclusive evidence of a payment in full.

The equity of redemption is of real value, only when there is a surplus in the value of the property over the amount of the incumbrance. Baxter by paying the \$250, for the equity admitted that there was such a surplus, and that he obtained by his purchase the amount of the mortgage debts, and something beside; and is estopped from denying the fact. 2 Conn. 161, *Baldwin v. Norton et al.* 7 Watts 475, *Pierce v. Potter.* 2 Johns. Ch. 125, *Tice v. Annie.* 7 Paige 248, *Cox v. Wheeler.*

Smalley & White for defendants.

It has been often decided as a clear and well settled rule of law, that where the mortgagor has by deed conveyed his equity of redemption to the mortgagee, in satisfaction of the debt secured in the condition of the mortgage, the mortgage becomes an absolute title, and is not merged in the equity of redemption, if such merger would operate to the injury of the mortgagee. *Marshal v. Wood*, 5 Vt. 250. *Putnam v. Russell*, 17 Vt. 54. *Slocum v. Cat-*

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lin, 22 Vt. 137. *Myers v. Brainard*, 1 D. Chip. 448. *Lockwood v. Sturdevant*, 6 Conn. 373. *Baldwin v. Norton*, 2 Conn. 161.

The general rule is that the union of estates will create a merger, unless there be some beneficial purpose or some interest to prevent it. *Starr v. Ellis*, 6 Johns. Ch. R. 393. *Gardner v. Aster*, 3 Johns. Ch. 53. *James v. Morey*, 2 Cow. 246. *Forbes v. Moffatt*, 18 Ves. 384.

If the incumbrance is greater than the land mortgaged, the mortgagee is entitled to his dividend. If the incumbrance still remains of greater value than the land mortgaged, the equity of redemption is of no value. If otherwise, the equity of redemption can be sold. *Duncan v. Fish, Admr.*, 1 Aik. 231.

The claims were properly allowed by the commissioners as a debt against the estate, and the purchase of the equity of redemption by Baxter, in manner and form as set forth did not pay and extinguish his debt against the estate, so as to preclude him from a dividend. *Findley v. Hosmer*, 2 Conn. 350.

The opinion of the court was delivered by

ISHAM, J. We are satisfied, upon an investigation of this case, that the decree of the probate court must be affirmed. The purchase by Mr. Baxter, of the Fletcher mortgage, vested in him the interest of Mr. Fletcher, with that of his own, as mortgagee of the premises. The allowance of the demands secured by mortgage, as claims against the estate of the mortgagor, will have no effect to defeat or impair that security, or prevent their being taken into account, in the allowance of such dividends against the estate, as may be ordered by the probate court. Until the claims are fully paid and satisfied by the mortgagor, or some person having his interest, they stand in the same situation, as other claims allowed against the estate, for which no security by mortgage was ever obtained.

There is no propriety in saying that the claim due and allowed to Mr. Baxter, or that which was allowed to Mr. Fletcher, and now owned by Mr. Baxter, was paid or satisfied, in the purchase by him, of the equity of redemption at the public sale by the administrator, under the license and order of the probate court. It is unquestionably true, that the union of the two estates effected

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by that purchase, vested in Mr. Baxter an absolute title and estate to the premises. But it has too often been decided in this state, to be now questioned, that such a purchase will not be considered a merger of the different estates of the mortgagor and mortgagee, so as to operate as payment or satisfaction of the debts for which the mortgages were given, when it will operate inequitably, or to the injury of the mortgagee. At law, the rule in relation to the merger of estates is somewhat more strict, than that which prevails in equity; but whether the matter arises at law or in equity, the estates of the mortgagor and mortgagee, when united, will not be considered or treated as merged, so as to operate as payment or extinguishment of the debt, unless such was the evident intention of the parties; nor will that result follow, if there exists some beneficial interest on the part of the mortgagee, that requires to be protected, and where it is for his benefit to keep the legal and equitable interests separate and distinct. This rule exists where the equity of redemption is released by the mortgagor himself during his life, and it applies with greater force, when that interest is obtained by the mortgagee, at a public sale by the administrator, for the benefit of all the creditors of the estate. *Myers v. Brownell*, 1 D. Chip. 548. *Marshal v. Wood*, 5 Vt. 250. *Slocum v. Catlin*, 22 Vt. 137. *Baldwin v. Norton*, 2 Conn. 161. *Lockwood v. Sturdevant*, 6 Conn. 390. 4 Kent's Com. 105. In the case of *Forbes v. Moffat*, 18 Ves. 384, the rule was recognized, that the whole question rests upon an expressed or presumed intention of the parties; and that the debt will be treated as paid and satisfied when it is evident that the release of the equity of redemption to the mortgagee was made with a view to satisfy the debt; otherwise, it will have no such effect. The master of the rolls, in that case observed, "that it is very clear, that a person becoming entitled to an estate subject to a charge for his own benefit, may if he chooses, at once, take the estate and keep up the charge, and upon looking into all the cases, in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interests were united, whether the charge should, or should not subsist." In cases where there is no interest on the part of the mortgagee to keep the two estates separate and distinct, a merger is effected by a union of the estates, the less estate sinks into the greater, and the debt will be

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treated as paid and satisfied, particularly if the value of the mortgaged premises is equal to the amount of the debt. If the equity of redemption in this case had been purchased by some other person, no one would question the right of Mr. Baxter, to receive these dividends, and then proceed, by a foreclosure of the mortgage, to obtain payment for the balance of his debt; for, in equity, and at law, he is entitled to both. By that procedure, he would obtain just what he now obtains by an affirmance of the decree of the probate court.

It is not to be presumed that Mr. Baxter, in purchasing the equity of redemption, was so regardless of his interest, as to pay therefor the estimated value of that equity, for the benefit of the estate, and thereby throw away his right to these dividends. That could not have been his intention, or the understanding of any one interested in that estate.

The case is free from any difficulty as to the real intention of the parties, and shows conclusively, that the estate was publicly offered for sale, subject to the application of this dividend on the claim of Mr. Baxter, which was secured by those mortgages; and that it was upon this basis the value of the equity of redemption was estimated at the sale. It is expressly stated, that at the time of the sale, the administrator gave public information, of the existence of these mortgages, and that Mr. Baxter was the assignee of the Fletcher mortgage, and that in his opinion fifty per cent would be paid on all the claims allowed, including the claims allowed to Messrs. Baxter and Fletcher, and that Mr. Baxter purchased that interest relying upon the representation that the dividends were to be paid to him. In affirming the decree of the probate court, we are manifestly carrying into effect the intention of the parties, and the equity of the case.

The judgment of the County Court must be affirmed, and the case certified to the probate court.

Nelson v. The Vermont & Canada Railroad Co.

BAILEY B. NELSON v. THE VERMONT & CANADA RAILROAD
Co.

Railroad Companies. Legislative Enactments.

The legislature may, by general laws, impose upon railroads new conditions, not contained in their charter, which are conducive to public interests.

The company owning a railroad will be liable for the acts of their lessees who run the road.

TRESPASS on the case, for running upon and killing plaintiff's cow, alleged to have happened by the neglect and refusal of the defendants to erect a fence upon the side of their road, as by their act of incorporation they were bound to do, and to build upon the land of said plaintiff sufficient cattle-guards.

Plea, not guilty, and trial by jury.

The facts, pertaining to the questions passed upon and decided, sufficiently appear in the opinion of the court.

B. H. Smalley for defendants.

I. The act of 1845, incorporating the Vermont & Canada Railroad Company, was a contract between the state and the corporation.

(1.) This company is a private corporation as contra-distinguished from public corporations, and therefore, any act of the legislature altering or abridging any of the rights, or powers conferred by their act of incorporation is a violation of the constitution of the United States.

(2.) The act of 1849, requiring the company to put in cattle-guards on road-crossings impairs the rights given to the corporation by their charter. If so, it is a violation of the constitution of the United States, and void on the ground of impairing the obligation of contracts. If the act of 1849, in relation to cattle-guards, is void, the company were not bound to put them in, and the charge of the court on this point was incorrect.

II. The Vermont & Canada Railroad Co., had transferred all their right to use the road to the Vermont Central Railroad Co., and the Vermont Central Railroad Co. had taken possession and were in the exclusive use and possession of the road at the

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time the injury complained of occurred, and had assumed the responsibility of making and finishing the road and fences.

If the injury occurred in consequence of running the cars without sufficient cattle-guards or fences, the Vermont Central Railroad Company alone were responsible therefor, and not the Vermont & Canada Railroad Company.

Stevens & Edson for plaintiff.

In this case, the plaintiff insists that the defendants by their charter were bound to make and maintain the fences on each side of their road where necessary; and that they could not free themselves from their legal responsibilities by leasing their road to others; and that if the injury was caused wholly by the neglect of the defendants, they are liable in this action.

The opinion of the court was delivered by

REDFIELD, Ch. J. A question of importance, and often of considerable difficulty, is made in this case; whether, and to what extent, it is competent for the legislature, by general laws, to impose upon railroads new and additional burdens not contained in their charters, after they have gone into operation. The charter of this company requires them, in general terms, to fence their road upon both sides where a fence may be requisite for the owners or occupants of the adjacent places, and to make suitable and safe farm-crossings. The general railroad act of 1850, requires all roads in the state, in addition to fencing and making farm-crossings, "to construct and maintain cattle guards, at all farm and road-crossings, suitable and sufficient to prevent cattle and animals from getting on the railroad." We think it might be fairly said, that cattle-guards are necessarily implied, in fencing a railroad, and making proper and safe farm-crossings. But we know that in practice it is not always done, perhaps not generally. It may be proper therefore, for the courts to consider the general power of the legislature over these corporations, after they have obtained their charters, and gone into operation, in regard to such matters.

It is certain, we think, that the legislature cannot impose new burdens upon corporations, under such circumstances, which are merely and exclusively of private interest and concern, and which have nothing to do with the general security, quiet and good order.

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But there can be no doubt, they have the same right of general legislation over these corporations, which they have over natural persons. By general laws, they may require them to conform to such regulations of a police character, as they may deem for the security of the rights of the citizens generally, and most conducive to quiet and good order, and the security of property, and even the life of animals. For this latter is a subject to which the legislation of the British Parliament, and of this, and most of the American states, has always extended, in the form of penal restrictions. And if the running of railroads, under present restrictions, was found cruelly and recklessly destructive, even of the lives of domestic animals, it would be strange if the legislature could not interfere, upon the general maxim, that every one shall be bound and required, *sic ut re tuo, ut alienam non laedas*. The subject of division fences between adjoining proprietors, has always been regarded as under the control of the legislature. There is no doubt, they may alter the laws upon that subject, so as to require fences to be built higher than is now required by law, which would no doubt be imposing an additional burden upon the adjoining proprietors. And this matter of fences and cattle-guards, and farm-crossings, between the railroad company and the proprietors of land, is much the same thing as the division fence between adjoining proprietors. But the reason for allowing an interference, in the case of railroads, is far more striking and obvious, in the instance, but the same in principle probably, as that of other adjoining land owners. And there is an additional ground of allowing the legislature the right to control this matter, which probably does not effect the present case, but which is included in the general subject; I refer to the great necessity of stringent regulations, to exclude cattle from the railroads, for the security of travelers, and the operatives upon such roads. To deny the legislature the control of the railroads in the state, in regard to fencing, both as to the fact and the mode of execution, would be to deny one of the most important and indispensable powers in regard to the regulation of the police of the state, the denial of which would be likely, in the long run, to prove quite as detrimental to the railroads as to the public. And it is precisely analogous to those compulsory requisitions, which the legislature in this state have always been accustomed to control, as to common highways, and with reference

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to natural persons. For a long time, and until 1840, land owners were required to maintain legal fences, adjoining the highways, in order to justify making distress of cattle, damage *feasant*. Since that time they have not been required to fence, adjoining the highway, and now all persons are forbidden to let their cattle, &c., run in the highway, which probably was intended, *off the land of the owner*, for to that extent it is questionable how far the legislature could prohibit the proprietor from depasturing the herbage, with his cattle; but undoubtedly they may require him to keep his cattle at home, as was always the common law or they may require him to fence in the highway, and in any mode they deem necessary and expedient. And so equally may they do in regard to railways.

There are many other matters of a similar character, which are connected with the security of life and property, to which I refer, by way of illustration merely, and the power of which has never been seriously questioned, as residing in the legislature. For instance, putting up signboards cautioning travelers of a railroad crossing, ringing the bell, or blowing the whistle at such crossings. And it has not been doubted but the legislature might require railroads to pass all common highways, either above, or below grade, or to come to a dead stop, before passing stations with express trains, as is required of all trains in Connecticut, before passing drawbridges; or to keep men stationed with signals, in sight of each other, as is done upon some roads, as one of their own police regulations, or not to run above a given rate of speed, or not to run locomotives in frequented places, and all similar regulations, obviously pertaining to the police of such corporations, and sensibly affecting the security of public travel, and the quiet and comfort of common life, to an indefinite extent. And these are all of a similar character to the one under consideration.

We need not probably illustrate this subject further to render it obvious to all minds. But the acknowledged legislative control over banks which, like railroads, partake somewhat of a public character, although based upon private stock, will perhaps throw some light upon it. There is no doubt that existing banks may be restricted, by general laws, from issuing bills of a given denomination, as has sometimes been done in regard to small bills, or from dealing in particular securities deemed detrimental to public security, as bills on time, or payable in stocks on time, or in bills

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of other banks below par, or that they might be even limited, in regard to discounts, and interest even, by general law, as was done, in many of the states, in former times of commercial distress. But the legislature could not require such banks, to discount at all or not to take interest, or to remit a portion of their debts, or to suspend the collection of them, or to take pay in goods, or land, at the appraisal of men. This even was attempted, in some of the states, but was held to be a violation of the vested rights of such corporations. The proper distinction is, between what is necessary for the public security, and what is merely of the private concern of such corporations, and no way affecting the public security and essential to their own corporate functions.

As to the liability of the defendants for the acts of their lessees, who were running the defendants' road, under a long lease, we think there can be no doubt. Unless we can hold the defendants thus liable, they might put their road into the hands of corporations, or individuals of no responsibility. It was on this ground that the English courts denied the legality of one road leasing itself to another, or to private persons, and the consequent loss of security to the public, without consent of parliament. *Beman v. Rufford*, 6 Eng. L. & Eq. 106. *Great Northern Railway Co. v. The Eastern C. R. Co.*, 12 *ib.* 224. *Norwich v. B. & L. R. Co.*, 13 *ib.* 506. The lessors must, at all events, be held responsible for just what they expected the lessees to do, and probably, for all which they do do, as their general agents. For the public can only look to that corporation to whom they have delegated this portion of public service. Certainly they are not bound to look beyond them, although they doubtless may do so. The lessors should see to it, that their road is properly fenced, before they suffer it to be run by any one.

Judgment affirmed.

Mason v. Potter.

GEORGE S. MASON v. JEREMIAH POTTER.

Jurisdiction. Copartnership. Practice.

Where the claim presented by the plaintiff exceeds \$100, it must be regarded as his book, within the meaning of the statute; and the fact that he fails to prove the claim fully before the auditor, or that it was not upon plaintiff's book, will not effect the question of jurisdiction, unless it appears that a portion of the claim was merely fictitious.

When a case is recommitted to an auditor, it is matter of discretion with him, whether to require the parties to go over anew the whole trial, or not; but if the purposes of a recommitment were for a new trial, and the auditor improperly refuses to try the case anew, the proper place to set the matter right, is in the county court.

The defendant contracted with the plaintiff, to furnish wool for hat bodies, and to peddle or sell the same, and charge nothing for his time or expenses in so doing; the plaintiff was to manufacture the wool into hat bodies, and charge nothing for his time while engaged in the manufacture; and each were to pay one half the expense of extra work, wood, and wear of the machinery, and the defendant after selling the hat bodies was to retain enough out of the proceeds to pay the cost of the wool, and the profits, after deducting the cost of the wool, were to be divided between them; it was held, that this did not create a partnership between the parties. *Tobias v. Biss*, 21 Vt. 544.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported substantially the following facts.

That in the fall of 1844, the plaintiff and defendant entered into a contract for the manufacture and sale of hat bodies; that the defendant was to furnish the wool for the hat bodies, and to peddle or sell the same after they were manufactured; that he was to charge nothing for his time while engaged in the sale; that each was to pay one half of the expense of extra labor, wood, and use and wear of the machinery; that plaintiff was to manufacture the wool into hat bodies, and charge nothing for his time while so engaged; that the defendant, after selling the hat bodies, was to retain from the proceeds the cost of the wool, and the profits, after paying for the wool, were to be equally divided between the parties.

The counsel for the defendant insisted that these facts made out a partnership, and that book account could not be sustained; and filed a motion to dismiss for want of jurisdiction.

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The county court accepted the report, and rendered judgment for the plaintiff for \$96.

Exceptions by defendant.

B. F. Bailey and *Geo. F. Edmunds* for defendant,

Insisted that the facts found by the auditor constitute a partnership between the parties, and cited in argument, Story on Part. 20 § 16-24. 3 Kent's Com. 24, 25, 26. Collyer on Part. § 18. 16 Johns. 34. 17 Maine 180. *Brown v. Cook*, 3 N. H. 64. *Green v. Beesely*, 2 Bing. New Cas. 108. *Everett v. Chapman*, 6 Conn. 347. *Fremont v. Coupland*, 2 Bing. 170. *Griffith v. Buffum*, 22 Vt. 181. *Champion v. Bostwick*, 18 Wend. 175. *Reid v. Hollinshird*, 4 Barn. & Cres. 867.

They also insisted that the motion to dismiss should have prevailed, for want of jurisdiction, and that plaintiff's claim, in fact, was below \$100.

Underwood & Hard for plaintiff,

Cited as to the question of jurisdiction, *Nichols v. Packard*, 16 Vt. 91. *Stone v. Winslow*, 7 Vt. 333.

They also insisted that the facts reported by the auditor do not show a copartnership between the parties. *Clement v. Hadlock*, 13 N. H. 185. *Bowman v. Baily*, 10 Vt. 170. *Dana et al. v. Cabot*, 6 Met. 82. *Rice v. Austin*, 17 Mass. 197. *Cutler v. Windsor*, 6 Pick. 325. *Turner v. Bissel*, 14 Pick. 192. *Loomis v. Marshall*, 12 Conn. 69. *Bradley v. White*, 10 Met. 303. *Messy v. Whitney*, 10 Johns. 226. *Kollogg v. Griswold*, 12 Vt. 291. *Tobias v. Blin*, 21 Vt. 544.

The opinion of the court was delivered by

REDFIELD, Ch. J. I. There can be no doubt the debit side of the plaintiff's claim, as presented, which for purposes of determining the jurisdiction, has long been regarded as his book, within the meaning of the statute, did exceed \$100, and that the county court, therefore had jurisdiction. The fact that the claim was not fully proved before the auditor, or that it was not upon the plaintiff's book, unless it appeared that it was merely fictitious, would not justify the court in dismissing the case, for want of jurisdiction.

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II. The auditor, on the case being recommitted, had undoubtedly a discretion, whether to require the parties to go over anew the whole trial, or not. In some cases, that would be proper, and in others not. If the auditor improperly refused to try the case anew, when such was the purpose of the recommitment, the proper place to set the matter right, was in the county court. As that court was satisfied with the course the auditor took, we must suppose he did as they required, when the case was recommitted. Such a question could not ordinarily come before this court on error, or by exceptions.

III. In regard to the question whether book account will lie, or the action should more properly be account, it becomes of less importance, perhaps, inasmuch as, if the case is opened, and referred to the auditor again, the statute of 1852, would undoubtedly govern the case so far as it is applicable to it. A statute in regard to the mode of trial expressed in general terms, as this is, affects pending suits, as much as any other. And that statute seems to provide, that any matter of account may be tried in an action of book account.

We might indeed, if fully satisfied that this was a partnership transaction between the parties, reverse the judgment, and proceed to render such a judgment as the county court should have rendered upon this report. But for one, the objection being merely technical, if the statute has now removed it, so that the transaction could now be adjusted in this form of action, I should choose, as matter of discretion, to recommit the case, rather than drive the party to a new action, if it were needful to do so, in order to save the rights of the parties.

But we do not consider that the plaintiff and defendant were partners between themselves, whatever might be their liability to third persons. It seems to us to be a case coming clearly within the class of cases, in our reports, which has now become pretty numerous, where the parties had a joint interest in the gross earnings, but not in the loss, or in the net proceeds of the adventure exactly.

Here the defendant was bound, at all events, to pay half the cost of extra work, wear of machinery, wood and oil. This was a proper debt, and might be charged and recovered without reference to the sales. Then the defendant does not seem to have

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had any claim upon the plaintiff for loss. He could take pay for the wool out of the avails of the sale of the hat bodies, and whether this deduction was to be made on each sale, or upon the whole amount collected is not very distinctly shown. Nor is it very material perhaps. It is clear that the defendant had no claim upon the plaintiff for it. If anything were realized above the cost of the wool, half of it went to plaintiff as a virtual compensation for the labor he had expended upon it. It seems, in principle, like many cases in this state and elsewhere. *Bowman v. Bailey*, 10 Vt. 170. *Ambler v. Bradley*, 6 Vt. 119. *Boardman v. Keeler*, 2 Vt. 65. The case of *Tobias v. Blin*, 21 Vt. 544, seems enough like the present to have a controlling effect upon its determination. The cases certainly are very similar. The case of *Griffith v. Buffum*, 22 Vt. 181, undoubtedly resembles the present case in many important particulars, but is by no means in conflict with the decision here made. The case of *Kollogg v. Griswold*, 12 Vt. 291, is in its principles more analogous, as it seems to us.

Judgment affirmed.

ROBERT BEACH, 2d, *qui tam v. OVETTE BOYNTON*.

[DECIDED IN CHITTENDEN COUNTY, DEC. TERM, 1853.]

Fraudulent Conveyance. Right of Surety for Grantor to Penalty under the Statute.

A surety for the grantor, in a fraudulent conveyance, is to be regarded as the party aggrieved by such conveyance, from the date of his suretyship, and before he pays any portion of the debt, and his right to recover the penalty given to the party aggrieved is perfected, by paying the debt, and dates from the time of his becoming surety.

QUI TAM action, founded upon Chap. 104, § 23 and 24 of the Comp. Stat. of this state, being Chap. 95 § 19 and 20 of the Revised Stat.

Plea, not guilty, and trial by jury.

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The plaintiff, to support the issue on his part, produced in evidence a certified copy of a deed, dated June 14, 1848, from Jedediah Boynton, to the defendant of several pieces of land situated in Hinesburgh, with the mill and machinery thereon, being the same described in plaintiff's declaration. Also, a certified copy of the record of a judgment, by confession, in favor of the defendant against said Jedediah Boynton, before John Wheelock, a justice of the peace, made on the 17th day of June, 1848, for the sum of \$878, damages, and twenty-five cents, costs, which judgment was also described in the plaintiff's declaration.

The plaintiff also offered testimony tending to prove, that the said Jedediah Boynton, and one Bial and Henry Boynton, were on the 17th day of June, 1848, and for many years previous thereto had been, partners engaged in the business of manufacturing, at said Hinesburgh, under the name and style of B. & H. Boynton; that on or about the first day of March, 1848, the plaintiff signed a note of that date payable four months from date to the Bank of Burlington, as surety for the said Jedediah, Bial and Henry Boynton; that said note was discounted by said Bank, at the request and for the benefit of said firm of B. & H. Boynton, and the money paid to them, which note was outstanding and unpaid on the 17th day of June, 1848.

The plaintiff also introduced in evidence two drafts, one for \$600, dated April 26, 1848, and one for the sum of \$400, dated March 9, 1848, both drawn by B. & H. Boynton, upon one Ray Boynton, of the city of New York, payable to the order of Jedediah Boynton, and indorsed by Jedediah Boynton, and also by the plaintiff; that said drafts were indorsed by the plaintiff, for the accommodation and as surety for the firm of B. & H. Boynton, and that they were discounted by the Farmers' & Mechanics' Bank, at the request and for the benefit of said firm, at or about the time of their respective dates, and that said drafts were on the 17th day of June, 1848, outstanding and unpaid.

Also evidence tending to prove, that when said drafts respectively became payable, they were duly presented to Ray Boynton, the drawee and payment thereof demanded; that the same were not paid by the drawee, and were duly protested for non-payment, and legal notice thereof given to the plaintiff and the other indorsers; and that the plaintiff was afterwards compelled to and did

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pay both of said drafts to the said Farmers' & Mechanics' Bank, the holder of said drafts, and that said drafts had never been paid by any one to the plaintiff.

The plaintiff also proved, that said note when the same became payable or shortly after, was paid by him to said bank of Burlington, and that it had never been paid to him.

The plaintiff also introduced evidence tending to prove, that on or about the 17th day of June, 1841, the said firm of B. & H. Boynton, including the said Jedediah Boynton, failed and became bankrupt, owing at the time from eighty to one hundred thousand dollars, and that said firm has ever since continued bankrupt and insolvent, having never discharged any part of said indebtedness. The plaintiff also introduced a copy of a deed executed by Jedediah Boynton, to Ray Boynton, dated June 17, 1848, conveying all his, said Jedediah's real estate in said Hinesburgh; also certified copies of two judgments, by confession, before John Wheelock, a justice of the peace, on the 17th day of June, 1848; one in favor of Ray Boynton, and one in favor of Elliot & Boynton, both against Jedediah Boynton.

The plaintiff also proved, that Jedediah Boynton died on or about the 24th day of June, 1848, and before either of said drafts, or said note became payable; that his estate was represented insolvent in the probate court, for the district of Chittenden, and that an administrator and commissioners were appointed, that said commissioners held their sessions agreeably to law, and that said two drafts and note were presented, and by said commissioners duly allowed in favor of the plaintiff against the estate of Jedediah Boynton; and that said allowance was at the time of the trial of this cause still subsisting against said estate, no part having been paid.

The plaintiff's testimony tended to establish all the facts necessary to enable him to recover in this action, provided he had shown any right, debt, or duty existing on the part of Jedediah Boynton, or said firm of B. & H. Boynton, towards the plaintiff within the meaning of the statute.

The court,—PIERPOINT, J., presiding,—decided that the evidence did not prove the existence of any such right, debt, or duty, at the time of the alleged conveyance and confession, on the 17th day of June, 1848; and directed the jury to return a verdict for

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the defendant. To which decision and ruling of the court the plaintiff excepted.

E. J. Phelps, D. A. Smalley and L. E. Chittenden for plaintiff.

We therefore insist that at the time of this fraudulent convey-

I. This statute does not in terms require that the person whose right, debt or duty is attempted to be avoided, shall be a creditor. The words are the right, debt or duty of *any other person*. It is not to be gathered from this statute that the legislature intended to confine its benefits to a mere creditor. *Troyn's case*, 2 Coke 82.

Are these words right and duty then to have any meaning at all? If the judgment of the court below is correct their meaning is synonymous with *debt*, and must be limited to that signification. It cannot be said that they refer to a case where the conveyance is made to avoid a debt not due, for it is equally a debt whether due or not.

No meaning whatever can be given to these words unless they apply to the case at bar, and the court should give effect to every word in the statute. Opinion of the Justices, 22 Pick. 573.

II. The statute so far as it relates to the conveyance and the judgment is a purely remedial statute. It was passed for the purpose of giving to the party injured an additional remedy for the collection of his debt and enforcing his right or duty. So far, therefore, as it renders such conveyances or judgments void, and so far as it relates to the persons at whose instance they may be declared void, it should receive a liberal and beneficial construction. *Brooks v. Claves et al.*, 10 Vt. 37. 5 Com. Dig. 327 to 330. 2 Blackstone's Rep. 12, 26. *Wilkinson v. Colbey*, 5 Burr. 26, 94. *Smith v. Moffat*, 1 Barb. 65. *Fairbanks v. Antrim*, 2 N. H. 105.

A different construction may properly enough be applied to that part of the statute which relates to the interest of the parties in making the conveyance, but the case shows, that on this point there was evidence which should have been submitted to the jury.

If then the statute is to receive a beneficial construction so far as it relates to the party, at whose instance the conveyance may be declared fraudulent, a creditor whose debt is absolute, stands in precisely the same relation to it, that the present plaintiff does, whose debt shortly after became absolute. The evil to be guarded against is in both cases precisely the same.

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ance and judgment, Jedediah Boynton was owing such a *right* and *duty* to the plaintiff, as entitles him to maintain this action.

It may be said, however, that this statute has received a construction in *Brooks v. Olaves et al.*, such as the defendant here claims for it.

It is true that Judge WILLIAMS in that case says, he apprehends the word *right* is synonymous with *debt* and *duty*. This we are under no necessity of denying in this case. But the point then before the court was simply this. It was claimed that the right to attach a debtor's property was a right within the meaning of the statute. This position was denied by the court and that is the full extent to which that decision goes. It does not at all affect our construction of the statute.

This statute makes the conveyance void, when made to avoid any debt, &c. This was clearly void as against the Bank, or the holders of these bills. It then gives a remedy to the party aggrieved, and a surety who is compelled to pay the debt is a party aggrieved within the statute.

Geo. F. Edmunds and *J. Maëck* for defendant.

I. Was the plaintiff "*the party aggrieved*" by the conveyance stated in the case; within the meaning of § 24 of the statute, so as to entitle him to sue for the penalty therein mentioned?

This action is in no sense remedial. The recovery of the penalty in no manner affects the rights or remedies under § 23 of the statute; it satisfies no debt; it discharges no right; it purges no fraud, &c. It simply punishes.

It must stand or fall, then, like a criminal prosecution, as it is in substance, upon a strict construction of the section on which it is founded. The liberal doctrines of equitable construction which have attached to remedies sought under § 23, and which the common law would have equally afforded, have no application to it. The party must bring his case clearly within the very words of the statute. *Hooker v. Wilkes*, 2 Strange 1127. *Daggett v. State*, 4 Conn. 60. *Leonard v. Bosworth*, 4 Conn. 421. *Valkenburgh v. Torrey*, 7 Cowen 252. *Wilder v. Winne*, 6 Cowen 284. *Brooks v. Olaves et al.*, 10 Vt. 37. *Mattocks v. Wheaton*, 10 Vt. 493.

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The penalty is incurred *at the time of the commission of the offense*, and the right to sue for it vests *then*.

The penalty in question vests in the person holding the debt, but then no longer depends upon the debt. It does not follow it upon assignment or negotiation; payment does not discharge it; the right to it resides and continues in the person in whom it first vested. *Forbes v. Davison*, 11 Vt. 660.

The question must be tried and decided as it stood at the time of the conveyance; and we confidently assert that no precedent can be found any where, which puts the right to the *penalty* upon any other footing.

Upon this principle were decided the cases of *Forbes et al. v. Davison*, cited *ante*. *Fox v. Hill*, 3 Conn. 320. *Aiken, qui tam v. Peach*, 22 Vt. 255. *Warren v. Piercy*, 22 Vt. 155.

The plain and obvious meaning of the word, right, in connection with "debt or duty" is a present cause of action for, or title to, the possession of a thing; and its correlative is, "duty." Bouvier's Law Dic. Title, *Right*. *Brooks v. Clayes et al.*, 10 Vt. 37. *Sargeant v. Lealand*, 2 Vt. 277.

II. The cases cited by the counsel for the plaintiff do not effect our position.

They proceed upon the statute of Elizabeth, and those like it, which are more extensive than ours.

They were not actions for the *penalty* given by the statute, but purely remedial actions brought to set aside the conveyances in respect to the original debt, after the surety had paid and levied upon the property.

In such cases the most liberal and extended construction does and should obtain.

III. Even admitting the soundness of the case of *Howe v. Ward*, 4 Greenl. 195, and the other cases like it, they fall far short of supporting this action.

The construction and effect of § 23, 24, and the nature of the proceedings under them are entirely different.

In the first, the law from certain facts *implies* the interest necessary, to avoid the conveyance, &c., although it be in fact entirely *bona fide*. In the second, the *mala fides* must be established as a *fact*. Under the first, the creditor cannot interfere until he has obtained a judgment, and then only to satisfy his debt; under the second, his right to the property accrues at once.

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By the first, the right to avoid the conveyance follows the debt, and if the debt is assigned, or into whose hands soever it may come, the right to avoid the conveyance continues with it; for the holder of the debt stands in the place of the creditor and is entitled to his remedies.

By the second, the right to the penalty remains in the first creditor and does not follow the debt.

No action would lie at common law for such a grievance even after payment. It is too remote a contingency. *Moody v. Burton*, 27 Maine 427. *Lamb v. Stone*, 11 Pick. 527.

Finally, no action of this kind has ever been brought or supported, either under the statute of Elizabeth, or any other; no precedent of this kind exists; almost three hundred years have passed since the statute of Elizabeth, and we submit, if the right of action had existed in such a case as this, it would have been discovered ere now.

The opinion of the court was delivered by

REDFIELD, Ch. J. The only question made in the present case is, whether the plaintiff is so related to the parties to the alleged fraudulent conveyance, as to be entitled to sue for the penalty. The plaintiff was at the time of the conveyance a surety merely, having never paid any portion of the debt, which he subsequently did pay, and had an allowance against the estate of the grantor in the conveyance. The question is, whether the plaintiff can be considered the party aggrieved, within the meaning of the statute?

It is certain that, for many purposes, the plaintiff was not a creditor, at the date of the conveyance. It is not claimed, nor is it necessary perhaps to show, that he was a creditor, in every sense, and to every purpose. He could not sue the principal, but in equity he might take proceedings, after the debt becomes due, to compel the creditor to assign the debt to him, on payment of the amount due, and thus enable himself to take the property of the debtor.

And it is not seriously urged, that he could not avoid the conveyance made by the debtor, after he became surety, and before he assumed the debt. It would be strange if this were not so. For it is admitted, as it must be, that he was a creditor after assuming the debt. But it is urged, that he is to be treated as a cred-

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itor subsequent to the conveyance, and only from the date of the actual assumption of the debt. Now it is very obvious that his rights, and the duty owing to him, are altogether of the nature of a prior creditor.

1. The prior creditor is allowed to avoid the conveyances because it deprives him of property, to which he does look, or has the right to look, for his indemnity. 2. The prior creditor may avoid a subsequent fraudulent conveyance, because it is supposed to deprive him of a means of indemnity, which may be presumed to have formed the consideration of his undertaking. 3. The subsequent creditor cannot avoid the conveyance, chiefly because he is not deprived, either of the consideration of his undertaking, or of his indemnity.

Now, in both these respects, the surety is more within the requisites of a prior creditor, than even the primary creditor was, who may be supposed, as is commonly the fact, to look more to the surety for his indemnity, than to the property of the primary debtor. And under these circumstances, if these debts were the only ones owing, (and they may fairly be viewed in that light, for the present purpose,) the surety is, in equity, and within the evil intended to be remedied, by the statute, far more obviously than the principal creditor, the party aggrieved. He is, if responsible, the only party aggrieved in the general and popular sense. And the grantor, in a case like that supposed, must be understood to have intended the necessary result of his conduct, *i. e.*, to defraud the plaintiff, by depriving him of all redress or indemnity for his undertaking.

But I should consider, that the plaintiff, to prevail, must not only show himself within the equity of the statute, and the evil intended to be remedied, but also within the fair import of the words of the statute, construed with reference to their subject-matter.

This statute must undoubtedly be regarded as a penal statute, so far as the present action is concerned, for any recovery had will be strictly a penalty. But as the statute is expressed, it seems to me impossible to say, that one who may avoid the conveyance under the twenty-third section, is not the party aggrieved under the twenty-fourth section. For the twenty-fourth section refers in express terms to the twenty-third section, for the definition of the

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"party aggrieved." The party aggrieved must be the party, and all the parties, whose right, debt or duty is attempted to be avoided.

And when it is said the plaintiff may avoid this conveyance possibly, but that he comes in to do so, under the common law, and not under the statute, I must say, that I do not feel any sound basis for such an argument to rest upon. If a statute exists upon the subject, it must be conceded that it was intended to supersede the common law, and to govern future cases. That being so, a case not within the statute might fairly be presumed to have been purposely omitted, and if so, virtually excluded from the benefit of the statute, and by consequence, of the common law, in regard to avoiding the conveyance, even by levying upon the property. And especially should this be so regarded, in a case coming clearly within the range of the statute. Now the statute may fairly be considered as intending to embrace all rights, coming under the general denomination of contracts. The word "debt" is undoubtedly the controlling word in defining the "party aggrieved." But very obviously the words "right and duty" are intended to extend the definition beyond the strict import of the word "debt," else they would scarcely have been used. That statute was drawn up, and has passed through the hands of men who may fairly be presumed not to multiply words for mere euphony; some purpose was doubtless intended to be served by them. But "right and duty" are no doubt limited to such rights and duties as are of the nature of debts, such as exist *ex contractu*. But even with that limitation, (and no other occurs to me, as coming fairly within the probable purport of the statute,) they are far more extensive in their signification than "debt" in its strict sense.

And although no right existed on the part of the plaintiff, or any duty on the part of Boynton, which could form the basis of an action at the time of the conveyance, yet that is not indispensable. If it were, the right or duty must not only exist, but be perfect, and *due* presently. It may doubtless be, not only due, *in futuro*, which no one denies, but it may be contingent, to some extent, like a covenant against incumbrances, or for quiet enjoyment, which could scarcely be said to import no duty, on the one part, or right on the other, and are clearly of the nature of a debt, so far as to be matters of contract, and are still as really contingent, as that of the right of a surety to indemnification. And if the surety had

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taken a bond of indemnity, no one could question his claim would be strictly analogous to that of the covenants of warranty in a deed. And still, I think, it would scarcely be claimed, that, in that case, the surety might be regarded as the party aggrieved by the conveyance, and not in a case like the present. Such a difference, in result, could scarcely be predicated upon a difference as to the form of the undertaking. There is as really a right to be indemnified on the part of the surety, and a duty on the part of the principal to indemnify, as if it were in the form of a bond. And it has been held, that if the surety has been really damaged, before he brings suit, and subsequently pays a part of the debt, or the whole, while the suit is pending, such payment, subsequent to the bringing of the suit, may be recovered in the action. The truth is, that in popular language, and within the evil intended to be remedied by this statute, the surety has a right and the principal owes him a duty, which is of the nature of a debt, to save him harmless. And if necessary, for any purpose, to show the date of his claim, he may declare upon this implied duty, or promise, to save harmless, which is certainly recognized in the elementary writers upon this subject, and in most of the cases which speak upon this part of the subject. *Ch. J. MelLEN*, fully indorses this view in *Howe v. Ward*, 4 Greenl. 195; and that case seems fully in point to govern the present in all its facts. And the case of *Carlisle v. Rich*, 8 N. H. 44, and the case of *Thompson v. Thompson*, 19 Maine 244, being bonds for official faithfulness, and the conveyance before any fixed liability of the sureties, seem in principle to control the present, and the courts, in both these cases, very fully recognize a surety as the creditor of his principal, from the date of his suretyship. So also does the case of *Sargent v. Salmond*, 27 Maine 539. And so does *Jackson v. Seward*, 5 Cow. 67; and the reversal of the case does not touch this question. The assertion of the court in *Brooks v. Olaves et al.*, 10 Vt. 37, that a party might set aside the contract, in many cases, where he could not recover the penalty, is no doubt true in many respects. But that, as our statute is expressed, both subjects being combined, by express reference, how it can be true, that in a case of clear proof, one may be so situated, as to be entitled to avoid the conveyance, and not sue for the penalty, I do not comprehend.

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The twenty-third section of our statute says that "only the party, whose right, debt, or duty is attempted to be avoided, may avoid the conveyance," and the twenty-fourth section, that "all the parties to such fraudulent and deceitful conveyance, &c. shall forfeit and pay a penalty," &c., which forfeiture shall be equally divided between the party aggrieved, *i. e.*, whose right, debt, or duty is attempted to be avoided; referring in *totidem verbis*, to the definition of the person who may avoid the contract, thus making them identical, so far as language can do it. So that to say, in this case, that the plaintiff is entitled, under the statute, to avoid the conveyance, and not to sue for the penalty, is a mere arbitrary evasion of the manifest import of the statute.

Bankrupt cases prove nothing either way. Sureties were formerly not allowed to prove their claim as creditors, either in this country or in England. But in the late bankrupt law of the United States, sureties were allowed to prove, and were, of course, barred by the bankrupt's discharge; as was held in the case carried up to the United States Supreme Court, from the decision of this court, *Wells v. Mace*, 17 Vt. 508, which was reversed upon that ground alone. And the late English bankrupt laws are the same. And so against insolvent estates, sureties may now present their claims. But these remote analogies prove but little either way. There are, no doubt, some difficulties in the way of treating the plaintiff, as the party aggrieved, from the date of his suretyship, but far more in denying it. If we deny it, we must, to be consistent also deny his right to avoid the conveyance. In allowing it, we meet the obvious intent of the statute, in both respects, and certainly do no violence to its words; while, in the other case, we defeat both the sense and the words, and the obvious design of the statute.

The first impression of the question in this case is very striking—that to deny a surety the right to come in as a creditor from the date of his suretyship, is a manifest perversion of his true position; and the more I have examined the subject, the more I have felt convinced, that the impediments in the way of his being so treated, are rather technical than substantial; that they are too refined for common apprehension, or general acceptance. Such a construction of the statute would be, in my judgment, but to invite additional legislation, in order to reach what is now very satisfactorily expressed in the statute.

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It can scarcely be claimed, I think, fairly, that the difference in terms between our statute and the statutes in Maine and New Hampshire, justify any difference of construction upon the point now under consideration. Our statute upon this very point is more comprehensive than in some of the states, where these decisions, treating a surety, as the party entitled to redress, as a creditor from the date of his suretyship, have been made, and no more perhaps than others, but they are all very similar, more so than the decisions in regard to them, very probably.

When CH. J. WILLIAMS says, in *Brooks v. Olaves et al.*, 10 Vt. 54, "I apprehend that the word *right*, is synonymous with debt or duty;" he is arguing against its extension to mean, a mere right to attach his debtor's property. And in that sense we fully concur. It most undoubtedly is confined to rights, which are of the nature of debts; but was, very probably, inserted to reach cases analogous to the present, where an inchoate right or duty existed, but which had not become ripened or perfected into a debt. And a statute without some such provision, all must admit, would be sadly defective. The fact that it was inserted shows the sagacity of the framers. And still the statute is so drawn as to exclude rights in the nature of torts, as was held in regard to the Connecticut statute, in the cases cited by the defendant's counsel. But within the range of matters of contract, I do not perceive but that our statute is as extensive as that of the 18th Elizabeth, or most of the American statutes upon the subject. It seems to have been the purpose of the Connecticut statute, and of that of this state, following in the same path, (and far more so than those of many of the states where the doctrine has been held which we now hold, as in New Hampshire and Maine, where, I think, the controlling word is "creditor,") to exclude rights of the nature of torts, or not to include them. And if we construe § 24 without reference to § 23, our statute giving the penalty to any party aggrieved, may be made as extensive as the New York statute. The party aggrieved, with no limitation, is as extensive as creditor, or any other person, but most undoubtedly, our statute intends any person aggrieved, by having his right, debt or duty attempted to be defeated. In the original draft of our statute upon this subject and until the revision of 1839, the right to avoid and to recover the penalty were both given, in one section and in terms, to the

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same persons, as at present. As we are not able to see any reason why a surety should not be treated as a creditor, or as one liable to be aggrieved, by his principal conveying away his property, to defeat the "rights" of the surety, and evade the "duty" of the principal, in the implied obligation to save the surety harmless, the judgment in this case is reversed, and the case remanded for trial.

JOSEPH HATCH, *qui tam* v. S. ROBINSON & Co.

SAME v. JAMES WADE.

Penal statutes. Flour Inspector, &c. Act of 1850. Inspection of Flour.

Flour inspectors are not the "persons injured" within the meaning of the act of 1850, by the sale of flour required to be inspected, without procuring the same to be inspected, and they cannot sustain an action on the statute for the penalty of such sale, as inspectors of flour.

The public at large, the dealers in flour, and not flour inspectors, are intended to be protected by the statute.

THESE were actions on the statute; one brought to recover the penalties for selling flour without having been inspected; the other brought to recover the penalty for inspecting flour, without having been duly appointed to that office.

Both cases were tried on demurrer; and the County Court,—PIERPOINT, J., presiding,—rendered judgment in both cases that the declaration was insufficient, and for the defendants to recover their costs. The facts sufficiently appear in the opinion of the court.

Exceptions by plaintiff.

W. W. Peck for plaintiff.

Smalley & White for defendants, Robinson & Co.

Peck & Bailey for defendant, Wade.

Hatch v. Robinson & Co., and Same v. Wade.

The opinion of the court was delivered by

REDFIELD, Ch. J. The first of these cases is brought to recover the statute penalty for selling flour, required to be inspected, without procuring the same to be inspected; the plaintiff being at the time, the legally appointed and qualified inspector of flour in the towns where such sales were made; and as such entitled to inspect and brand such flour or casks, and to demand and receive the statute fees for the same. The second action is brought to recover the penalty for usurping the functions of the office of flour inspector, without having been duly appointed to the same, thus lessening plaintiff's emoluments. The penalties, in both cases are given to the party, or "person injured." A preliminary question, decisive of the action in one event, then arises, whether this plaintiff is the person injured, within the meaning of the statute. The question is a very narrow one, and one upon which we can derive little light, from the general rules, in regard to the construction of statutes. Whether the statute is strictly or liberally expounded, according to the letter or the spirit, *ut res magis valeat vel pereat*, seems of little significance. The question, after all, is, what is the reasonable purport, force and effect of the statute? And whether the law will be likely to be more strenuously or fully enforced, in one view, than in another, can have no controlling effect in determining its construction. We have no doubt the legislature intended to have the statute enforced, and we presume the change in regard to the mode of bringing the action for penalties, upon this subject, made in 1850, might have been intended to secure the more certain enforcement of the penal sanctions of the statute, or at least that this was the probable purpose and expectation of the large number of the members. But if the change, through misjudgment, or inadvertance, or the indiscretion of some interested persons in or about the legislature, should prove to have virtually produced an opposite effect, it will not be the first time such results have come about, in similar modes, and could afford no just grounds for giving the statute a forced construction, in order to abate such consequences.

The question, after all, recurs, is the plaintiff the person aggrieved or injured, in either or both these cases. And the cases seem to us to be sufficiently analogous, in that respect, to admit of, and probably to merit a similar determination. For in some

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probable and remote sense, it may well be conjectured, that the plaintiff has suffered injury or damage, in both cases. One who takes an office to which fees are attached, may fairly be presumed, perhaps, to derive some profit from his fees, and some injury from the loss of such emoluments. But the question really is, was it the purpose, or fairly within the probable design of the statute, as gathered from its terms, to protect the right of flour inspectors to their fees?

After considerable examination, and a good deal of reflection upon the subject, it seems to us impossible to answer this inquiry in the affirmative. We think the terms, person injured or aggrieved, in the common language of statutes, giving rights of action or penalties to such persons, must be regarded as extending only to such persons as are immediately injured, by the very act prohibited, or by some direct and immediate, or necessary and natural consequences of such act; and that persons only collaterally or incidentally injured by such act, are not ordinarily regarded as coming within the purview of the statute. It has been considered, that if a certain act be required by a statute, or a certain duty of persons, whether natural or artificial, and no specific remedy pointed out, that the party benefitted by the duty, or injured by its omission, may recover all damages sustained *by an action upon the statute*, and many statutes give an action, for all damages sustained to the *party injured*, and where a penalty is given, and no specific mode of recovery pointed out in the statute, it may be enforced, by indictment, where no person is named to take the penalty. But in none of these cases was it ever held, that one indirectly and remotely injured, might sue, to recover either damage sustained, or a penalty. *Baxter v. Winoski Turnpike Co.*, 22 Vt. 114.

The very case before the court, if carried beyond the party injured, directly by the sale, may be carried to any extent. There is no limitation. And unless we confine the right of action to the parties, to the sale prohibited, it certainly admits of an indefinite extension. Who are the parties aggrieved by exporting flour, or by offering it for sale, is a question more easily asked than satisfactorily answered, it must be confessed. But we cannot suppose that the legislature, in affixing any of these penalties, had in mind the protection of the rights or interests of flour inspectors.

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It is obvious their rights or emoluments, do not, in any sense, enter into the purpose of the statute. It is for altogether a very different object. And it could never have entered the mind of any member of the legislature, that flour inspectors were the persons likely to be injured, by a disregard of the statute. If that was all, or indeed any purpose of the statute, we should have found it differently expressed, or it would never have been passed. It is certainly a very ingenious device to carry the statute into effect, but one so clearly without the general scope and object of the statute, that it would seem far better that such a statute should fail of enforcement in some of its provisions, than that a penal statute should receive an extension, by mere construction, so entirely beyond the general scope of its terms, and the probable purpose and object of its enactment. The case of *The King v. The Justices of Middlesex*, 3 B. & Ad. 938, (23 Eng. Com. Law R. 223,) seems to us to have adopted even a narrower view of the import of the term party aggrieved or injured, than the one we here adopt. There was good reason to say, in that case, that an old innkeeper was more or less *directly* injured by licensing a new house. But the case goes upon the ground that the keepers of public houses were not the persons intended to be protected by the statute, but the public at large. So here, too, it is the public at large, the dealers in flour, and not the flour inspectors, that are intended to be protected by the statute.

In both cases, judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
FOURTH JUDICIAL CIRCUIT.
NOVEMBER TERM, 1854.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

KENDALL BRUCE & WIFE v. HIRAM THOMPSON.

*Marriage Settlement. Construction of Married Woman's Act.
Comp. Stat. Chap. 68 § 15.*

A marriage settlement incomplete by reason of a want of trustees, is only an agreement to make a settlement, and will not, at law, exempt the annual crops of the wife's land from an execution against the husband.

By the language of the married woman's act, (Comp. Stat. Chap. 58 § 15,) the annual product of the wife's land is not exempted from the husband's control, or from his creditors.

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TRESPASS for taking and carrying away of the separate property of the said Martha, wife of said Kendall, four tons of hay, one cow, and twenty bushels of oats.

Plea, not guilty, and trial by the court.

The parties agreed upon the following facts.

That some time prior to January, 1845, the said Kendall Bruce and one William Bruce, were justly indebted to one John Gray, of Montpelier, in the sum of eighty dollars, specified in a promissory note, dated the 7th day of February, 1842, and signed by the said William and Kendall Bruce, and made payable to the said Gray or order, on which note the said Kendall Bruce was surety. That some time in the month of February, 1848, the said Gray commenced a suit against said Kendall Bruce alone, on said note, and recovered judgment on the same, before a justice of the peace.

And it was further agreed, that heretofore, to wit, on the — day of —, 184—, the said Kendall Bruce, now about sixty years of age, intermarried with one Martha Nash, of East Montpelier, and that said Martha was possessed of property to the amount of about \$—, which she inherited from her father, whose estate was then in process of settlement, of which estate one John Mellen was administrator; and prior to the intermarriage of said Kendall and Martha, they executed a contract called a marriage settlement; that soon after the marriage of said Kendall and Martha, the said Martha purchased a small farm, with a house and barn on the same, in the town of Plainfield, of the value of about \$500; and the said Kendall and Martha went into possession of the same, and lived and carried on, the same farm, as husband and wife usually live and carry on, lands owned by the wife (the said Kendall doing most of the out-door work on the farm,) and occasionally help was hired, what other help was necessary to carry on said farm; and the said Martha doing the work in the house. And it is further agreed, that in the spring of 1851, the said Mellen, administrator, did deliver to the said Martha Bruce, two cows, as her own property, which were purchased at her request for their support on said farm, and charged the same to her on her account against the estate of her father—which two cows immediately went into the possession of the said Kendall Bruce and Martha Bruce on said farm, and from that time up to the

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26th day of December, 1851, remained on the premises owned by the said Martha, and in the possession of said Kendall and Martha, aforesaid; but the said Kendall has made no claim thereto, but has abided by said marriage settlement. And it is further agreed, that during the season of 1851, the said Kendall and Martha raised on said farm about four tons of hay, more than sufficient to keep one cow and ten sheep through one winter, and did raise twenty bushels of oats more than ten bushels of grain exempt from attachment by law—which said four tons of hay, twenty bushels of oats, and said two cows, on the — day of —, A. D. 1851, were on said farm, and under the care of said Bruce and wife, as aforesaid. And it is further agreed, that on the day and year last aforesaid, the said Gray prayed out his writ of attachment in due form of law, against said Kendall Bruce—which writ was made returnable to Washington County Court, November Term, 1851, on the judgment rendered by said justice in his favor, against said Bruce, as aforesaid; which writ was put into the hands of Hiram Thompson, constable of Plainfield, to serve, who legally served said writ, by attaching as the property of said Kendall Bruce, one of said cows and about four tons of hay, and twenty bushels of oats, being the same oats and hay before mentioned, which was not exempt by law in favor of debtors; which writ was duly served and returned and entered in court, when such proceedings were had; that at the November Term, of said court, 1851, the said Gray recovered judgment against the said Kendall Bruce, for \$—, and costs of suit; and on the first day of December, 1851, the said Gray prayed out his writ of execution on the judgment aforesaid, for the debt, damages and costs aforesaid, dated the first day of December, 1851, all in due form of law—which execution was put into the hands of the said Thompson, on the 22d day of December, 1851, and within thirty days from the rendition of said judgment, and the said Thompson, on the said 26th day of December, 1851, took said cow and four tons of hay, and twenty bushels of oats, and posted the same in due form of law, and sold the same at said Plainfield, on the 12th day of January, 1852.

The County Court, September Term, 1852,—PECK, J., presiding,—rendered judgment for the plaintiffs to recover for the hay and oats the sum of \$— and costs, upon the facts agreed, and

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decided that the plaintiffs were not entitled to recover for the cow.

Exceptions by defendant.

J. A. Wing for defendant.

The only question raised in this case is, are the crops raised by the husband on the real estate of the wife, after they are severed from the freehold, liable to be attached on the separate debts of the husband?

By the common law, all the wife's personal property, by the marriage, vests *eo instanti* in the husband, and he becomes liable to pay all her debts and liabilities and all gifts to the wife after marriage, never vest in the wife, but in the husband. 2 Blacks. Com. 488, 495, and cases cited. *Parks & Co. v. Cushman & Trustees*, 9 Vt. 320. *Crosby's Admr. v. Otis*, 32 Maine 256.

And the same rule exists in chancery. *Chase et al. v. Palmer et al.*, 25 Maine.

The use of the wife's real estate belongs to the husband during coverture, and the products of the same go to the husband or his personal representative. *Mattocks v. Stearns & Wife*, 9 Vt. 326. *Shaw, Admr. v. Patridge*, 17 Vt. 626.

The wife has no interest in law in the annual products of her lands, unless given to her by the statute. Comp. Stat. 403 § 15.

Do the words *rents*, *issues* and *profits*, in our statute, mean the annual products of the land when raised by the husband? We claim not. By the same section it is expressly enacted, that the husband cannot sell and convey away the *rents*, *issues* and *profits*, which are thus protected, except by joint deed of husband and wife.

If the construction claimed by plaintiffs is correct, then the husband cannot sell any part of the crops, unless his wife join in a deed, and have the same acknowledged and recorded, &c.

Statutes in derogation of the common law, are to be construed strictly, and cannot be extended further than the express wording of the statute will warrant. *Paine v. Ely et al.*, 1 D. Chip. 37.

Merrill & Willard for plaintiffs.

The statute of 1847, exempts from attachment, on the sole debts of the husband, the "rents, issues and profits of the real estate of any married woman, and the interest of her husband in her right

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in any real estate," &c.; and the property sued for in this case, is the issues and profits of the lands belonging to the wife.

The purpose of the statute is obvious, which is to secure to the wife, the entire use and control of her real estate, as against the creditors of the husband, and the language used is clear and plain, and beyond doubt broad enough to carry out this purpose. The words descriptive of the estate and property exempted, *are the very words* that the law uses in describing the husband's interest in the wife's estate. To confine their scope to that part of his interest in her lands, which is technically *real estate*, as now claimed, would give a construction foreign to the ordinary and popular sense of the language, and wholly strange to persons of ordinary intelligence. And it would require a lawyer, astute, and possessed of a strong proclivity for dissection, to discover and start a construction such as claimed.

The rule, that the common and popular meaning is to be given to the words of a statute, unless another one is apparent obtains in England, and is founded in reason and good sense. It is more reasonable and *imperative* in a free government. Is there anything, then, compelling a technical or limited construction?

The ante-nuptial contract, bars the right of the husband to those crops, as well as to the cow. The old, refined, but absurd doctrine, that the marriage is a revocation of the marriage settlement, has long since been discarded in equity, and the husband is held as trustee for the wife, where there is no intervention of trustees.

The same rule should hold in law, and the court of law should resume a jurisdiction, which was yielded on a point of legal fiction, and not drive suitors to a court of equity.

The opinion of the court was delivered by

REDFIELD, Ch. J. This action is brought to recover the value of property, sold by the defendant as an officer, upon execution, for the sole debt of the husband, the property being the annual products of the wife's land, in possession, and carried on at the expense of the husband. The parties, before their intermarriage, made, in contemplation of such an event, what they considered a marriage settlement which was a stipulation between themselves, merely, and without the intervention of trustees, that the wife

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should enjoy her separate property, without interference on the part of the husband. The statute law of the state in force, at the time of the crops being grown, and which it is claimed, controls the matter was as follows: "The rents, issues, and profits of the real estate of any married woman, and the interest of the husband, in her right in any real estate, shall, during coverture, be exempt from attachment, or levy of execution, for the sole debt of the husband, and no conveyance by such husband, of such rents, issues, and profits, &c., shall be valid, unless by deed of husband and wife," executed according to the general laws of the state.

It is claimed, first, that the marriage settlement, as it is called, was sufficient to exempt the annual crops of the wife's land from attachment and levy of execution, on the husband's debt. But such a contract, without the intervention of trustees, will not, at law certainly, have that effect. Such a contract so executed, is incomplete. It is, at most, but an agreement to make a suitable marriage settlement. And the parties, beneficially interested, whether the wife or children, may, on application to a court of equity, compel the execution of such a settlement, as the court shall deem reasonable, which will then be effective to protect the property at law. 2 Story's Eq. Jurisp. § 983, 999.

In regard to the effect of the statute, which is similar to those of some of the other American states, there seems to have been, to some extent, a popular impression, that it would exempt the annual products of the wife's land, from the control of the husband or his creditors. Such was the decision of the court below, and such the impression of one member of this court, at the first argument. But a careful examination of the terms of the statute, cannot fail, we think, to convince all, that the words used have no very marked fitness, to express the yearly products of land, which are the joint results of labor and the use of the land.

Rents, issues and profits, more commonly, in the books, certainly signify a chattel real interest in land, a kind of estate growing out of the land for life, or years, producing an annual or other rent. And in this statute, it is so connected with "the interest of the husband in her right in any real estate," so as to induce the the suspicion, certainly, that the legislature supposed they were only limiting the husband's control over such estate, as he would upon the marriage, acquire in the wife's land, and really doing

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nothing more than securing to the wife and family, the use of the wife's chattels real, and the husband's estate in her lands, whether during coverture or by the courtesy. These estates, (although growing out of the wife's lands,) by the common law, upon the marriage, become vested in the husband, and he may sell, assign, mortgage, or otherwise dispose of them. 2 Kent's Com. 113. They may, too, probably be levied upon, for the sole [^]ebt of the husband, or might have been before this statute. And the statute of this state, giving the right generally to levy upon leasehold estates, uses almost the same terms as the statute under consideration. "The rents, issues, and profits of real estate, leased for life or years, shall be liable to be taken on execution;" thus showing that the two statutes, might, very likely, have adopted the same form of expression, *de industria*. Rents, issues, and profits, too, apply only to net profits, and such as are of the nature of rent, which is, as every one understands, a *reditus* or return by some one, holding the land of another, for which he *owes* such *return*. Now the husband holds the wife's land, in no such tenure, but in his own right as husband, *owing a return* to no one. It is observable, too, that the legislature, in providing a homestead for the family, and securing its annual products for their support, use appropriate and specific language by providing that the homestead, "and the yearly products thereof," shall be exempt from execution, and that the husband shall not alienate or mortgage the homestead, but no provision is made against *conveying the yearly products* of the homestead.

And if we regard, in the statute under consideration, the terms "rents, issues, and profits," as equivalent to *yearly products*, we must all allow, that this statute has, in express terms, required the transfer of such yearly products, to be by deed of the husband and wife jointly, and to give effect to such provision, we must hold, that any other mode of alienation, even for value, cash in hand, if you please, or necessities for the family, or to pay the very laborers upon the land, is altogether void.

The very use of the term conveyance, in the statute, with reference to this interest, shows the probable application of the term to some estate in the realty, for it is scarcely supposable, that the legislature would have used such a term, requiring it to be executed, with all the solemnities of other deeds of real estate, for the transfer of mere personal chattels.

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It may be supposed by some, perhaps, that this construction gives less adequate protection to the wife's property, which seems of late to be regarded as a very cherished object by all. But we can only say, it affords all the protection which the law gives at present, and to carry the protection the length claimed, would certainly be attended with serious inconvenience, and often produce injustice, and for one, I am ready to say, I have no expectation, the legislature ever supposed they were making any such provision, or that they ever will, so far as the conveyance or transfer of the yearly products of the wife's land is concerned.

Judgment reversed, and case remanded.

HILLARD WITHERELL v. GOSS & DELANO.

Audita Querela. Officer's Return.

The return of an officer is conclusive evidence, between the parties to a suit, that the defendant was notified of the time and place when and where the writ was returnable.

The return of the officer being conclusive, *audita querela* cannot be sustained to set aside the judgment for want of notice of the commencement and pendency of the suit.

And in such case if the party had no notice of the suit, he may have his remedy against the officer for a false return, or he may, under the provisions of the Comp. Stat. 281 § 8, 2, prefer his petition to the county court for relief.

AUDITA QUERELA, brought to set aside the judgment of a justice of the peace, on the ground that the complainant had no notice of the suit, except such as was conveyed to him by a copy, in which he was notified to appear at L. Henry's office in Waterbury, on the 19th day of February, 1853, at one o'clock, P. M.; and that the complainant, on said 19th day of February, 1853, repaired to said Waterbury, to make defense with his counsel and witnesses, and about two o'clock, P. M., went to the office of said Henry, who

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was the attorney of said Goss & Delano, and there demanded to be heard in said suit; but said Henry informed complainant that judgment had been taken against him in said suit, in the forenoon of said day, and that the time set in said writ for complainant to appear was 9 o'clock A. M.; and that for his non-appearance default was taken; and that said justice refused to open said cause for hearing without the consent of plaintiffs below, and their attorney refused to give such consent, &c.

To the writ of *audita querela* the defendants, Goss & Delano, demurred.

The County Court, September Term, 1853,—POLAND, J., presiding,—decided that the said writ and declaration were insufficient. To which decision the plaintiff excepted.

L. L. Durant and P. Dillingham for plaintiff.

Cited in argument. *Stone v. Seaver*, 5 Vt. 549. *Barrett v. Copeland*, 18 Vt. 67. *Mosseaux v. Brigham*, 19 Vt. 457. *Staniford v. Barry*, 1 Aik. 321, and cases there cited. *Porter v. Vaughn*, 24 Vt. 211. *Felker v. Emerson*, 17 Vt. 101. *Paddleford v. Bancroft et al.*, 22 Vt. 529. *Eddy v. Cockran*, 1 Aik. 862. *Brown v. Stacy*, 9 Vt. 118. *Phelps v. Birge*, 11 Vt. 161. *Crawford v. Cheney*, 12 Vt. 567.

L. Henry for defendants.

Cited in argument. *Stone v. Seaver*, 5 Vt. 549. *Lovejoy v. Webber*, 10 Mass. 101. *Staniford v. Barry*, 1 Aik. 321. *Marvin v. Wilkins*, 1 Aik. 107. *Hawks v. Baldwin & Co.*, Brayt. 85. *Barre v. Copeland*, 18 Vt. 67.

The opinion of the court was delivered by

ISHAM, J. The judgment of the county court in this case must be affirmed. It is admitted by the demurrer, that the process in favor of *Goss & Delano v. Witherell*, was returnable on the 19th of February, 1853, at 9 o'clock in the forenoon; that it was duly served by a deputy sheriff; and that from the officer's return on the precept, it appears, a true and attested copy of the writ, with the officer's return, was left with this complainant. Under this return of the officer, it was the duty of the justice on the return day of the writ, to render his judgment for the plaintiff by default, if

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Peck & Colby for defendants.

P. Dillingham for plaintiffs.

The opinion of the court was delivered by

REDFIELD, Ch. J. The only question made, in the present case, is, whether the plaintiffs, can recover the costs and expenses of the former suit in this case. The case of *Newbury v. The Conn. & Pass. R. Railroad Co.*, decided in Orange county, by this court, some three years since, and not yet reported, was almost identical with the present, and the question was then made and decided, that the plaintiffs were entitled to recover the costs and expenses of the former suit. The question was not made in that case, in regard to litigation, upon grounds peculiar to the town, and in which the railroad had no interest, nor is that question made here. It does not appear that any of the expenses incurred in the former suit in this case, arose from any such attempted defense; and we could not presume that, and for one, I do not well see, how any such distinction is maintainable upon principle. If the town were justified in making the defense, they were bound to make it upon every ground which seemed hopeful, as it seems to me. The only question seems to me to be, whether the town were justified in making the defense; but the costs, not allowed to be recovered in that suit, were such as accrued in trying the question of antagonist liability between the railroad and the town. But if in any case, one having an ulterior indemnity, may justly incur expense in attempting a defense, and be entitled to recover the amount of his guarantor, it would seem he should in this case. It was a matter of doubt as to the right of Battey, to recover, and of serious difficulty, and one of which the railroad were informed, and which they neither assumed to solve by taking the burden of the defense, or directing its abandonment. The town then could do no less than make the defense.

1. It is now perfectly well settled in this state, and in England, and probably in most of the American States, that in covenants of warranty of title, and for quiet enjoyment, the covenantee being evicted, is entitled to recover costs, and expenses, as between attorney and client; notwithstanding it is also well settled, that the covenantee is not obliged to hold out against the claim of the evic-

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tor, until actual eviction, but may buy in his claim, when convinced that it is irresistible, and recover the amount paid, with previous costs and expenses. *Smith v. Crompton*, 23 Eng. Com. Law R. 106, is an English case, in the King's Bench, in 1832, which seems to have been well considered, and covers both points fully. *Pitkin v. Leavitt*, 13 Vt. 379.

2. This rule is not confined to cases of covenants for title, and for quiet enjoyment, or indeed to covenants of indemnity against suits, loss or damage, or to that class of contracts of indemnity, but extends to all cases of suretyship, where the claim was in its nature disputable, or unliquidated, and has generally been extended to costs recovered against the surety, in all cases, and to costs incurred by the surety in making defense, when it was done *bona fide*, and with a reasonable probability of success. *Deering v. The Earle of Winchelsea*, 1 Lead. Cases in Equity, note 102; *Wynn v. Brooke*, 5 Rawle, 106. In the case of *Hayden v. Cabot*, 17 Mass. 169, PARKER, Ch. J., thus lays down the rule in regard to the implied obligation to indemnify a surety: "If the surety pays voluntarily, he shall be reimbursed; if he is compelled by suit to pay, he shall also be indemnified for his costs and expenses." This seems to us more in accordance with sound principle, and more reliable authority, than the decision of the same court, in the case cited in argument. *Lowell v. B. & L. Railroad Company*, 23 Pick. 24.

3. Finally it seems to us of the slightest possible consequence, in regard to expense to the defendants in this case, whether the expenses were incurred in making defense in the first suit, or that were compromised by the town, and then the whole matter litigated in this suit, as it inevitably must have been.

Judgment for the plaintiffs affirmed.

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GEORGE W. COLLAMER v. ORISON FOSTER.

Partnership. Liability of Partners to each other.

In general, it is well settled, that no action of assumpsit can be sustained by one partner against his co-partner, in respect to any matter connected with the partnership transactions.

But if the parties, by an express agreement, separate a distinct matter from the partnership dealing, and one party expressly agrees to pay the other, a specific sum for that matter, at a given time, the action of assumpsit will lie on that contract, though the matter arose from their partnership dealing.

So where the defendant agreed to pay the plaintiff a given sum per ton for a quantity of starch, and the costs of transportation to the place where the plaintiff was to deliver the same by the contract, the payment to be made by a given day, it was held to be an express contract, on which the plaintiff can sustain the action of assumpsit.

ASSUMPSIT for a quantity of starch, and freight of the same.
Plea, the general issue, and trial by the court.

The plaintiff claimed to recover for 43,121 pounds of starch, at the price of \$3,87½ per hundred, including freight from Barre, to Northfield.

The defendant admitted that the amount of starch was delivered at Northfield, prior to the 20th day of February, 1849, and that he received and sold the same.

The plaintiff read in evidence the following contract, dated January 19, 1849, and signed by himself and the defendant.

" 1. Geo. W. Collamer, on his part, to deliver the starch, say "about 20 to 25 tons, at Northfield, by the 20th of February "next.

" 2. Orison Foster, to take the starch and become a co-partner "with G. W. Collamer, by selling the starch, and paying a draft, "said Collamer gave W. & F. H. Whittemore & Co., which is "due about the 15th day of March next.

" 3. All the loss or gain on the starch is to be divided equally "between said Collamer and Foster, after Foster's paying Colla- "mer \$3,75 per hundred, at Northfield, and \$2,50 per ton for the "freight to Northfield, from Barre, which Foster is to do by the "15th of March next.

" 4. Foster to sell the starch, and pay the draft aforesaid, for

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"about one thousand dollars, and the residue to make the above sum of \$3,87½ to Collamer, and the loss and gain to be divided between them.

"The starch to be of good quality, and Foster comes in partner with Collamer, on these conditions, and Collamer agrees the starch to hold out weight."

The defendant claimed that the proceeds, of the sale, deducting the necessary charges and expenses, were less than the amount claimed by the plaintiff. Both plaintiff and defendant furnished specifications of their claims.

The plaintiff admitted two items in defendant's specifications, a store account and note to Orange County Bank.

The defendant claimed that on the evidence, the plaintiff could not maintain this action; but the County Court,—POLAND, J., presiding,—rendered judgment for plaintiff to recover for the amount of said starch, and freight to Northfield, deducting said two items in defendant's specification, and interest after March 15, 1849.

Exceptions by defendant.

T. P. Redfield and *P. Dillingham* for defendant.

The starch by the terms of the contract, is the *stock in trade*.

The plaintiff furnishes the stock, and the defendant agrees to furnish labor, care, and diligence.

Plaintiff puts into the partnership the starch at three dollars and eighty-seven and a half cents per hundred.

Defendant agrees to take it to market—"and comes in partner with Collamer on these conditions,"—Collamer agrees that the starch shall hold out weight; and the loss and gain is to be divided between them.

The writing, on its face, shows that the parties launched a partnership—it professes to be articles of partnership—"and Foster comes in partner with Collamer on these conditions."

It was necessary to fix a value to the stock, furnished by plaintiff—a standard above which was *gain*, to be equally divided between the parties; below which was *loss* to be also equally divided.

The defendant insists, that the plaintiff should bring some proper action to close up and adjust all balances, due either party, arising out of the relation imposed by that contract.

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And that the proper action is *account*.

If this were strictly a mercantile matter—the plaintiff put into the partnership \$1,000, and defendant assumed to carry on trade for one year, then pay to the plaintiff the capital, and divide the loss and gain—it is quite obvious, if there was less than \$1,000, at the end of the year, such loss does rest equally upon the parties; and such relation can only be adjusted by the action of account.

It has been admitted by the plaintiff's counsel, that this action has no scope to determine or adjust the liabilities of the parties, under this contract, but that the plaintiff should recover in this suit, and then one of the parties should bring his action of account.

Yet it can hardly be denied, that one suit in proper form, would adjust all matters between the parties, growing out of this contract.

The action of account and assumpsit are not concurrent.

The defendant claims that the net sales of this starch, after deducting charges for freight, storage, and insurance, is considerably less than the plaintiff recovered below.

The plaintiff has insisted, that portions of the contract should be *rejected*—but it is the duty of the court to give force and meaning to every part of the contract. "*Ut magis valeat quam pereat.*"

Where plaintiff agreed with defendant to convey by horse and cart, the mail between W. and B. at £9 per mile, per annum, and to pay his proportion of the expenses of the cart, &c.; money received for the carriage of parcels to be divided between the parties, and the damage occasioned by the loss of parcels, &c., to be borne in equal portions; held, that this agreement constituted a partnership, *inter se*. *Green v. Busby*, 2 Bingham N. C. 108.

This is not a case where money was paid to launch a partnership as was the case in *Venning v. Lecker*, 13 East 7. *Wilkins v. Henshaw*, 11 Pick. 79. *Helmer v. Smith*, 20 C. L. R. 302. *Dab & Dab v. Hasley*, 16 Johnson 33. *Fremont v. Compeland*, 9 C. L. R. 366. *Cheap v. Cromond*, 6 Com. Law R. 557. *Reid et al. v. Hollinshead et al.*, 10 Com. Law R. 460.

Chancellor KENT fully indorses the opinion of Ch. J. SPENCER, in *Dab & Dab v. Hasley*. See 3 Kent's Com. 28.

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Peck & Colby for plaintiff.

It is claimed by the defendant that the contract between the parties constituted a copartnership, and that the remedy should be sought in "account." But the agreement was that the defendant should pay \$—— per ton for the starch on or before a certain day, and this promise is independent of any question of profit or loss. Such payment was a condition *precedent* to any right in defendant to become a partner. Such payment was defendant's capital—and for that the suit is brought. Assumpsit lies by one partner against another to recover a sum which must have been the *basis* of the account when the partnership commenced. *Venning v. Lecker*, 18 East 7.

Lord ELLENBOROUGH says, "The purchase of goods was to launch the partnership, for which each, between themselves was to contribute his share." *Gale v. Lockie*, 2 Starkie 107. *Helmer v. Smith*, 2 Bing. 709. *Vanness v. Forrest*, 8 Cranch 80. *Duncan v. Lyon*, 3 J. Ch. 362. *Collyer* on Part. 269, 270. *Gow* on Part. 72, 73. *Williams v. Henshaw*, 11 Pick. 79.

The opinion of the court was delivered by

ISHAM, J. The plaintiff has brought this action of assumpsit to recover for a quantity of starch, which was received and sold by the defendant; and also, for money advanced by him for its transportation to Northfield. A recovery in the case is resisted on the ground that the property was received under a partnership contract and is involved in their partnership dealing and account; and that the remedy of the party is not at law in this form of action; but is confined to the action of account, or bill in equity, in which all the partnership dealing can be liquidated, the balance ascertained, and finally determined.

As a general rule, it is well settled, that no action of assumpsit can be sustained by one partner against his co-partner, in respect to any matter connected with the partnership transactions, or which would involve, the consideration of their partnership dealing. *Chitty* on Cont. 236. The reason is, "that it is impossible under that form of action to settle the partnership accounts, and that it would be useless for one partner to recover what, upon taking a general account, he might be liable to refund. *Collyer* on Part. § 264.

On the other hand, one partner may sustain an action at law, against his co-partner, "on an express contract, or covenant, to do,

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or omit to do, any particular act, not involving any question as to the general accounts. Thus, if one partner agrees to advance a specific sum of money as his proportion of the capital, an action at law will lie to recover that amount, even during the partnership. Such was the case of *Venning v. Locker*, 13 East 7, and *Gale v. Lecker*, 2 Starkie 107. So if money is loaned by one partner to another, for the purpose of forming the partnership, the money loaned can be recovered in this form of action if an express contract is made for its repayment. Collyer on Part. 264, note 4. Gow on Part. 72, 73. 19 Wend. 424. In the case of *Williams v. Henshaw*, 11 Pick. 79, MORTON, J., observed, "that if the plaintiffs had shown an agreement on the part of the defendants to advance one half of the money necessary to carry on their joint speculation, or a promise to repay the plaintiffs for their advances, they might well recover upon such undertaking in the present action." We think this doctrine is sustained by the authorities, and that a just construction of the contract between these parties, will bring this case within its provisions.

The contract was made on the 19th of January, 1849, in which Mr. Collamer agreed to deliver to the defendant at Northfield, about 20 or 25 tons of starch by the 20th of February then next. By this provision it is obvious, that the starch was to be furnished or procured by Mr. Collamer, at his expense and on his sole responsibility. The defendant on the delivery of the starch at Northfield, agreed to take the same, dispose of it in market, and to pay the plaintiff for the starch, and the cost of its transportation to Northfield, amounting to \$3,87½ per ton, by the 15th of March then next. The language of the parties, in their contract is in these words, "the loss or gain on the starch is to be equally divided between said Collamer and Foster, after Foster's paying Collamer \$3,75 per hundred at Northfield, and \$2,50 per ton for the freight from Barre, to Northfield, which Foster is to do by the 15th of March." In this language, there is an express promise to pay Mr. Collamer that amount by that time. We are led by this provision, to think, that the parties did not intend to treat the starch as partnership property. It was to be the property of Mr. Collamer, under an authority in Mr. Foster to dispose of it. In Bissett on Part. 60, 61, it is said, "that property which belongs to one or more members of a firm, but not to all, or in other words,

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"the ownership of which is not co-extensive with the partnership "is not partnership property." The property, estimated at a given value, was to stand as a claim to be paid by Mr. Foster, at a specified time; the same as if so much money had been advanced to Mr. Foster, to launch the partnership, under an express agreement to repay the same on a given day. On this construction, the case falls within the rule and language of MORTON, J., in the case of *Williams v. Henshaw*. 11 Pick. 79. It was the use of that property during that period without interest, under an authority to sell it, with what should be realized on its sale, more than the amount which was to be paid to Mr. Collamer, which was to be applied against the personal services of the defendant, that was to be the subject of their joint interest and dealing. Under such circumstances, this action can be sustained.

But if the starch is to be considered as partnership property, the result, under this contract, will be the same. If there had been no express contract to pay for that property by the 15th of March, this action could not have been sustained; for, under such circumstances, the law will imply a repayment only of the balance after the liquidation of the partnership dealings. But the rule seems now to be well settled, that if the parties by an express agreement, separate a distinct matter from the partnership dealing and one party expressly agrees to pay the other, a specific sum for that matter, the action of assumpsit will lie on that contract, though the matter arose from their partnership dealing. Collyer on Part. § 272. Bissett on Part. 128. *Coffee v. Brian*, 3 Bing. 54. *Jackson v. Stopherd*, 2 Crompt. & Mees, 361.

In the case of *Gibson v. Moore*, 6 N. H. 547, it was held, that partners may separate any portion of the partnership effects from the rest, and that a promise to pay that sum is binding, and an action may be sustained for it, although it is not the final balance upon a settlement of the whole concerns of the partnership.

When it is stated in this contract, therefore, that the defendant will pay the plaintiff the sum of \$3,87½ per ton, for the starch and cost of transportation, by the 15th of March, we can regard it in no other light, than as an express contract, on which this action can be sustained; as well, as if the defendant had given the plaintiff a promissory note for that amount payable at the same time. *Vanness v. Forrest*, 8 Cranch. 30.

The judgment of the County Court is affirmed.

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HOSEA HUMPHREY & WIFE v. CHARLES D. KASSON.

Proceedings in a prosecution for Bastardy. Bail. Principal & Surety. Scire facias. Liability of Bail.

In a case of bastardy, the liability of the bail, on the recognizance taken before the magistrate, may be discharged by a surrender of the principal, at the term, when he is required to make his appearance.

But the mere attendance of the principal in court to defend the suit, is not sufficient to discharge the bail, there must be a formal surrender of the principal into the custody of the court, and an *exoneretur* entered upon the record in discharge of the bail.

And if no such surrender is made, or recognizance entered into at that term, of the court, the recognizance taken before the magistrate is forfeited, and stands as security for the payment of such sums of money, as may be ordered for the support of the child.

If the mother execute a release to the principal, neither he or his bail can avail themselves of it while the overseer legally controls the prosecution, under the statute, for the benefit of the town; but if the interest of the overseer have ceased, and the mother prosecutes the suit for her benefit, such release pleaded in bar, is a good defense as to her; and if the town are not entitled to the sums of money ordered to be paid, then she cannot claim it against her release.

SCIRE FACIAS on a recognizance entered into before a justice of the peace, in a prosecution for bastardy against one Johnson, conditioned that said Johnson should appear at the county court and perform the order of said court, &c.

The defendant pleaded three several pleas in bar; in the first and second he set forth that the principal was sick and wholly unable to appear, or be surrendered in discharge of his bail, at said court, and so continued during all said term of court, and from thence ever after up to the time of his death, continued in such a poor state of bodily health, that he could not at any time have been arrested and committed to jail, &c. In the third plea, defendant set forth, that after the begetting of said child, and while said plaintiff was sole and unmarried, that she wholly and absolutely released said Johnson from all damage and cause of action whatever, which might accrue, by reason of the begetting the child, &c. And that the sums of money and costs, which by the terms of the judgment were due and payable prior to ——— have been paid, &c., and that said town of Fayston, has been fully indemnified

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for all expenses heretofore incurred, and that they are no longer subject or held to support said child, &c.

To these pleas in bar the plaintiffs demurred.

The County Court decided that the defendant's pleas in bar are insufficient, and rendered judgment for the plaintiffs.

Exceptions by defendant.

G. F. Edmunds for defendant.

1. It has long been well settled, that the liability of bail in cases of this kind is analogous in all respects to that of bail on *mesne* process, &c. *Mather v. Clark*, 2 Aik. 209. *Gray v. Fulsome et al.*, 7 Vt. 452.

2. The sickness of Johnson, at the time he was required to appear, so severe as to make it morally impossible to surrender him, (and especially when followed by his death of the same,) created a substantial excuse for not keeping the recognizance.

Johnson could not be surrendered without the hazard by the defendant of the guilt of homicide, nor could the court commit him without similar risk; and it would be absurd and inhuman to surrender under such circumstances, when it could be followed by no beneficial or useful consequences whatever. *Cathest v. Cannon*, 1 J. C. 28. *Lofflin v. Fowler*, 18 J. R. 358.

3. The third plea shows the *bona fide* execution of the release for a valuable consideration; that the defendant was prevented from availing himself of it by the entry of the overseer, and that all right of the overseer to the money ordered to be paid is gone.

The single question then is, whether the plaintiffs can have the benefit of this state of things, to avoid the effect of this release as to themselves. We are not able to perceive any principle which will warrant such an outrage upon justice. It would be quite as absurd as to say that the overseer should be affected by the release. *Sherman v. Johnson*, 20 Vt. 567.

We concede the rule, that we cannot plead anything that could have been pleaded in the original action; but this could not be pleaded in that stage of the suit, as was decided, because it was in substance a suit by the town; but now the case is continued both in substance and form, by the individual for his own benefit, and we submit that she cannot have the benefit of the prosecution without letting in the defense to it, as to her.

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The substance of the plaintiff's argument is that the release will not bar the past stage of the case, because the overseer controls it, and that it will not bar the proceeding by the plaintiffs because it should have been made at the past stage of the case, and therefore it can have no effect in any manner.

Peck & Colby for plaintiffs.

The bail in a recognizance taken by a magistrate upon a complaint for bastardy, can only be exonerated from his liability for his principal by an actual surrender of the principal into the custody of the officers of the court, and this must be evidenced by an *exoneretur*, entered upon the record. *Blood v. Morrill*, 17 Vt. 598. *Simmons v. Adams et al.*, 15 Vt. 677.

And an appearance by attorney is no discharge of bail. *Ibid.*

The third plea sets up a defense, of which the defendant might and did avail himself before judgment, and the judgment is an estoppel.

No matter of defense can be pleaded to a *scire facias* on a record which existed anterior to the recovery of the judgment; and neither bail nor sureties can plead that judgment was obtained against them by fraud. 1 Chitty's Pl. 426. Gould's Pl. 297 § 154. *Parkhurst v. Sumner*, 23 Vt. 538.

The opinion of the court was delivered by

ISHAM, J. The Comp. Stat. 423 § 3, provides, that a justice before whom a person is charged with being the father of an illegitimate child, shall require him to enter into a recognizance to such woman, with sufficient sureties, conditioned that he personally appear before the county court, and answer and abide the order of the court thereon. If the person charged is adjudged to be the father of the child, and the court order the payment of specific sums of money for its support, the father is required at the term of the court when the orders are made, to enter into another recognizance to abide and perform the orders of the court. This recognizance is a discharge of the one before the magistrate. Comp. Stat. 424 § 8, 9.

The liability of the bail on the recognizance taken before the magistrate, may be discharged by a surrender of the principal, at the term, when he is required to make his appearance. *Simmons v.*

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Adams, 15 Vt. 681. *Blood v. Morrill*, 17 Vt. 598. *Mather v. Clark*, 2 Aik. 209. But the mere attendance in court by the principal, to defend the suit, is not sufficient for that purpose, there must be a formal surrender of the principal *into the custody of the court, sedente curia*, and an *exoneretur* entered upon the record in discharge of the bail. If no such surrender is made, or recognizance entered into at that term of the court, the recognizance taken before the magistrate is forfeited, and it stands as security for the payment of such sums of money, as may be ordered for the support of the child.

In this case, as no such surrender was made, and no recognizance entered into as required by the statute, the defendant is liable on the recognizance taken before the magistrate, unless the matters pleaded in bar constitute a defense. We do not see, upon the authorities, how the two first pleas in bar can be sustained. The first plea goes to the whole action; the second, to the sum ordered to be paid and due September 1, 1851; in each of which, the sickness of the principal is relied on, as an excuse for not making the surrender, or entering into the recognizance. In the case of *Wynn v. Petty*, 4 East 102, the same facts were relied upon, on an application for further time to make a surrender; but the application was refused. The court remarked, "that they thought the inconvenience ought rather to be borne by the bail who must be fixed for not complying with their undertaking, than by the plaintiff who would, otherwise, be delayed of his right. That the hardship of a particular case would not justify them in departing from the established practice of the court, and where one party must suffer by the act of God, they could not interfere." In *Goodwin v. Smith*, 4 N. H. 29, it was held, "not to be a good plea in bar to a *scire facias* against bail, that the principal, on the first day of the term, when judgment was rendered against him, became sick, and so remained until after the return day of the execution, so that he could not have been removed without manifest danger to his life, and after the return day, died."

If the death of the principal had occurred before the liability of the bail had become fixed, an *exoneretur* would have been ordered, and perhaps the same rule would exist in other cases of legal impossibility, as in the case of a confinement of the principal in other person's hands under the custody of the law. 16 East 389. But

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when the liability of the bail is fixed, the subsequent death of the principal, will not have the effect to discharge him.

We think, however, that the facts stated in the third plea, constitute a defense to this suit. There can be no doubt, that as between the mother of the child and Johnson, the release executed by her, before her marriage with Humphrey, will be a good defense to this suit, and will bar any further claim on him, arising out of that matter. *Sherman v. Johnson*, 20 Vt. 467. The release, however, will have no effect as against the town of Fayston, in which the mother had her settlement. When the overseer of that town filed the certificate of his intention to prosecute, control, and manage the suit, and to indemnify the mother from all future costs, the town became the party, and the only one, who could control the suit. The mother could no longer be recognized as such, until the town was indemnified, or security given for the support of the child, as provided for in § 14 and 22 of the act; in that event, the statute provides, that the powers granted to the overseer, shall cease. Comp. Stat. 425 § 14, and 426 § 22.

To avoid the operation of that certificate, and give effect to the release, it is averred in the plea, that all the sums of money and costs, which under the order and judgment of the court were to be paid prior to the 1st of September, 1850, were paid and discharged; that the town of Fayston, is no longer subject or held to support the child; that they have no interest in the remaining sums ordered to be paid, which remain unpaid; and that this suit is now prosecuted by Humphrey and wife for their sole use and benefit, and that they are the real parties in interest. No objections have been taken to the form of this averment; we are, therefore, to regard it as stating, that the town of Fayston, are secured or indemnified against the support of the child, and all previous costs and expenses paid. Under such circumstances, the overseer has no longer any control of the suit. His authority as such overseer in the management of that suit, has ceased. But as the proceedings were originally commenced by the mother, her right, to prosecute and control the same revived, when the right of the overseer ceased, and in her own right she would be entitled to receive the remaining sums ordered to be paid. But when she resumes the further prosecution of the matter, she does it, subject to every defense that exists between her, and the person charged as

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father of the child. When the judgment was rendered, and the money ordered to be paid, the release which was given to the defendant could have no effect. Its existence and effect was not, and could not have been involved, in any issue formed between the town and the defendant. The defendant was prevented from availing himself of it, by the entry of the certificate of the overseer. But when his interest and right as overseer has ceased, and the mother is prosecuting the suit for her benefit, the release pleaded in bar, is a good defense as to her. If the town are not entitled to the sums of money ordered to be paid, the plaintiffs cannot claim the amount against their release.

The judgment of the County Court must be reversed, and the case remanded.

STATE v. ROBERT LABORE.

Indictment. Pleading.

In an indictment, every traversable fact must be distinctly alleged, with time and place.

In an indictment for bigamy where the time and place of the first marriage was left blank, on demurrer the indictment was held insufficient.

INDICTMENT for bigamy. The first count set forth, "that Robert LaBore, of Potton, Canada East, on the — day of —, A. D. 18—, at —, in —, did marry one Catherine Pratt, and her, the said Catherine, then and there had for his wife, and that the said Robert LaBore afterwards, to wit, on the 24th day of April, A. D. 1853, at Marshfield, in said county of Washington, with force and arms, at said Marshfield, feloniously did marry, and to wife did take, one Mary Wheat, of said Marshfield, the said Catherine, his former wife, being then and still alive, contrary," &c.

The second count set forth, "that Robert LaBore, of Potton, Canada East, the husband of one Catherine LaBore, and Mary Wheat, of Marshfield, in said county of Washington, on the

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"24th day of April, A. D. 1858, with force and arms, at said Marshfield, were found in bed together, under such circumstances, as to afford presumption of an illicit intention between them, the crime of adultery then and there to commit, contrary," &c.

To this indictment the counsel for the respondent demurred, and under the statute stated the following causes of demurrer: "That the marriage of the said Robert LaBore with Catherine Pratt, as alleged in said first count of said indictment, is not set forth with sufficient certainty, there being divers blanks left in said first count, and divers omissions of material averments—that no place is alleged at which the said first marriage with the said Catharine Pratt took place; that the said LaBore's marriage with said Catherine Pratt, is alleged in said first count of said indictment, to have taken place in the year 18—, and at no other time; that it does not sufficiently appear from said indictment, that the said Catherine Pratt was alive at the time of the alleged marriage with said Mary Wheat; that the second marriage of said Robert LaBore, is not alleged to have been to any woman, but to one Mary Wheat, and to no other person, and that said first count is in other respects uncertain, insufficient and informal, &c.

And the said Robert LaBore, by his attorneys, Peck & Colby, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the second count of said indictment; that there is no allegation in said second count of said indictment, that the said Robert LaBore was found in bed with a woman, but only with one Mary Wheat, and with no other person, and also that said second count of said indictment is in other respects uncertain, insufficient and informal," &c.

The court adjudged the first count sufficient, and that the respondent answer over, and that the second count is insufficient.

Exceptions by respondent.

Peck & Colby and Merrill & Willard for respondent.

In an indictment every material fact which is issuable and triable must be laid with time and place. Comyn's Dig. Indict. (G. 2.) *King v. Holland*, 5 T. R. 619, 625. *King v. Aylett*, 1 T. R. 36. Bacon's Abridg. Indict. 561.

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The first marriage in prosecutions for bigamy, is a material fact. It must be proved by the same measure of testimony as the second. 3 Greenl. Ev. Title, Polygamy. Without it there is no offence proved. It is issuable and triable, and must be alleged with certainty of time and place.

This is necessary to protect the respondent. If he be innocent, if the allegation of the first marriage be uncertain, he should have the charge distinctly made against him, that he may come before the court prepared for his defense.

The forms of indictment all provide that it should be alleged.

M. H. Sessions for state.

The second marriage, constituting the offence for which the respondent is indicted, it is wholly immaterial at what time or where the first marriage took place; provided, it is distinctly alleged in the indictment, that at the time of the second marriage, the first marriage was in fact then subsisting. 1 Russ. on Crimes 188. Arch. Criminal PL 629.

The opinion of the court was delivered by

REDFIELD, Ch. J. It seems to be regarded as a uniform rule of pleading, applicable to indictments, that every traversable fact must be directly alleged, with time and place. The first marriage, in prosecutions for bigamy, is always traversable, and must be established, by positive proof of the very fact of marriage, if such proof is attainable. It is not claimed, that such fact is here so alleged, the time and place being both blank. This merely is formal, and of the least possible importance, but unless all form is to be disregarded, (which we could not do without a statute to that effect, after having so long regarded it as essential,) then this indictment is fatally defective.

Judgment reversed, and judgment that the indictment is insufficient.

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SAMUEL HAYDEN v. JOSEPH JOHNSON.

Referee, finding of. Statute of Limitations.

Whether the admissions of a party take a case out of the statute of limitations, is a question of law merely, and where the terms of the admissions are found by the referee, it may as such be always decided by the court.

Where the defendant when called upon for payment said, "I supposed it was paid by White, by an arrangement; tell your father to put White up to pay it,—if he does not, I shall have to pay it,"—*Held*—that this admission, with proof that White had not paid it, would remove the statute bar.

If A. agrees to take a debt of B. against a third person, as payment, *in present*, he will be bound by it, and it will amount to a virtual purchase of the claim and an agreement to accept it as payment *pro tanto*, upon A's claim against B.

ASSUMPSIT on a promissory note.

Plea, general issue, and statute of limitations, and referred under rule of court.

The referees reported substantially as follows :

That plaintiff presented the note of which the following is a copy.

"For value received I promise to pay Samuel Hayden, or order, thirty-nine dollars in neat saleable cattle, bulls and stags exempt, not over eight years old, one half to be paid in the month of October, 1853, and the remainder in the month of October, 1844, to be delivered at Samuel Hayden's dwelling house in Duxbury, with use.

(Signed.)

JOSEPH JOHNSON."

"Huntington, Sept. 3, 1842.

Indorsed Oct. 27, 1844, \$21.34."

It was proved that in June, 1843, Charles D. and Aden Stevens, and one Lyman White, contracted to build a barn for the plaintiff, and after doing part of the job, the Stevenses and White had difficulty, which resulted in the transfer of the Stevens' interest in the contract to said White, for the sum of \$13,00, which White agreed to pay; and the Stevenses being indebted to defendant, it was agreed between plaintiff, the Stevenses and White, (to which defendant afterwards assented,) that said \$13,00, should be indorsed on this note, and the defendant allow the same on his claim against the Stevenses, and White allow the \$13,00, to the plaintiff on the barn contract. White did not finish the barn according

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to the contract, but, being poor, called upon the plaintiff for payment, in small sums, as he progressed with the work, until the plaintiff had fully paid White the whole sum due for building the barn, without deducting the \$13,00; but it was proved that plaintiff, at the time the sum indorsed on the note was paid, told the defendant that he treated the \$13,00, as a payment, and we allowed the \$13,00, as a payment on the 15th of June, 1848.

It was further proved that said White was indebted to the defendant, (but how much, was much disputed by the parties before us, and left much in doubt, but not in a sum sufficient to pay the balance of the first instalment on the note,) and White agreed to pay the balance of the first instalment of this note, and plaintiff agreed with defendant "to take White paymaster." White never paid anything to the plaintiff on this note, but the defendant rested in faith of this arrangement, and supposed the note paid, until the statute of limitations had run upon the note, except he had an interview with plaintiff's son, hereafter mentioned. It was claimed by the defendant, that this should operate as a *payment* of the note.

That plaintiff proved, he sent his son, before the statute run upon the note, to ask defendant for payment on this note, and defendant then said, "I supposed it was paid by White, by an arrangement; tell your father to put White up to pay it,—if he does not, I shall have to pay it."

The plaintiff claimed this declaration of the defendant removed the statute bar.

That the actual indebtedness of White to the defendant, at the time of the arrangement between plaintiff, defendant and White, before mentioned, was \$4, on the 15th of June, 1848. The referees adjudged that the said \$13, should apply as payment upon the note;—that the arrangement between the parties to this suit, and White, was a transfer of White's actual indebtedness to defendant, to the plaintiff, *in present*, and that the \$4, should be applied as payment *pro tanto*. They also adjudged that the defendant's admission to plaintiff's son, did not remove the statute bar; and that plaintiff is *barred* by the statute of limitations, from recovering the balance of the note.

The County Court, September Term, 1853,—POLAND, J., presiding,—rendered judgment on the report for plaintiff, and in mak-

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ing up the judgment allowed the \$13, and the \$4, as payment upon the note, no question being made as to the \$13.

Exceptions by defendant.

Maynard & Mead for defendant.

The referees' report finds that the balance due on the first installment, after the application of the \$13, was to be paid by one White; and that the plaintiff agreed with the defendant to take White paymaster; and that the defendant, in faith of this arrangement, supposed the note paid.

1. We insist that the agreement of the plaintiff to take White, paymaster, made under the circumstances, as stated by the referees should operate as a payment of the note.

2. It is insisted that the finding of the referees,—that the plaintiff from recovering the balance of the note is barred by the statute of limitations,—is conclusive upon the question.

The referees as triers of the facts can alone determine what the defendant intended by the language used to Roswell Hayden, as stated in the report, as the intention would have to be gathered from all he said at the time, and the surrounding circumstances, and not from a single isolated expression.

3. We insist that the language used as reported by the referees, does not remove the statute bar, as it neither imports an acknowledgement of the debt, as now existing, nor a promise to pay. *Phelps v. Stewart*, 12 Vt. 256.

4. The defendant said, he supposed the note was paid by an arrangement with White—by no means admitting the debt was then due; and the other part of the expression—that he should have to pay it if White did not—neither implies any promise to pay or willingness to pay; but at most, the opinion of the defendant, as to his then legal liability.

5. The reference in this case was general, and the referees were not required to decide the case on strictly legal principles; and the referees have not referred the questions of law to the determination of the court, in such a manner as to make the result of their finding depend upon that determination. And we think it is not, by any means, apparent to this court, that the referees intending to follow the law, have so far mistaken it, that they were brought to a different result, from that they would have reached

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had they known what the law was ; and if not, then the court will not revise their finding. *White et al. v. White*, *Err.* 21 Vt. 250.

P. Dillingham for plaintiff.

The facts reported by the referees, as to what the defendant said to the plaintiff's son, when he called on him for pay on the note, shows both a distinct admission of the debt, and a substantial promise to pay it. Either will avoid the statute of limitations. *Phelps v. Stewart*, 12 Vt. 256. *Paddock v. Colby et al.*, 18 Vt. 485. *Caruth v. Paige*, 22 Vt. 179. *Burton v. Stevens*, 24 Vt. 131. *Hill v. Kendall*, 25 Vt. 528.

2. The four dollars, was wrongfully allowed, to the defendant as payment on the note. White's indebtedness to the defendant was on book, and its amount was always matter of dispute. The referees find that it did not exceed \$400. This was never paid to the plaintiff, in whole or in part, nor was it so transferred to the plaintiff, as to extinguish White's liability to the defendant, and give a right of action to the plaintiff to recover it of White. Short of this it was no payment. Chitty on Contracts 613. 3 Term Rep. 180. 5 B. & A. 228. 4 B. & C. 166.

The opinion of the court was delivered by

REDFIELD, Ch. J. In regard to the conclusiveness of the finding of the referees, as to the statute of limitations, it is merely a question of law, the terms of the admission being found, and as such may always be decided by the court, as was held, by this court, many years since ; and the county court having treated it as virtually referred by the referees to them, and upon that ground, reversed the finding of the referees, we must conclude they correctly understood the report of their own referees, unless it appears they did not. There is first an intendment, in favor of the report, and secondly, one in favor of the judgment of the court below. These, in a measure, balance each other, in this case, but the final presumption is in favor of the judgment, inasmuch as the reference is from that court, and the report to them, and as all doubts might have been solved, by a recommitment, we must conclude, that would have been done, unless the court had regarded it as sufficiently explicit, in favor of the construction which they adopt.

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2. If then the question of the legal effect of the admission was properly referred to the county court, there can be little doubt they decided it correctly. It seems to have been a clear admission of continuing liability, unless it was paid by White, and this made before the bar, and upon which it is presumable the plaintiff might have rested, and thus suffered the term of the statute of limitations to elapse; such an admission comes clearly within the rule adopted in this state, requiring an admission of *continuing liability*. And if this liability is conditional, as in the present case, it is required to remove the condition, i. e., in this case, to show that White had not paid. This is not claimed.

8. We think the plaintiff having agreed to take the debt of defendant, against White, as payment, *in present*, he must now be bound by it. It would be a virtual purchase of defendant's claim against White, and an agreement to accept it, as payment, *pro tanto*, upon plaintiff's debt.

Judgment affirmed.

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ABATEMENT.

A second suit for some of the same things, sued for in a former suit, still pending will not abate in whole or part the other suit. *Ballou v. Ballou et al.*, 673.

See PLEADING; TRUSTEE PROCESS, 3.

ACCEPTANCE. *See* PROMISSORY NOTES AND BILLS OF EXCHANGE.

ACCOUNT.

1. In the action of account, matter, which shows that defendant is under no obligation to account, cannot be pleaded before the auditor; if defendant would avail himself of such an objection, he must plead it specially in bar of the action, before judgment to account is rendered. *Baxter v. Thompson*, 559.
2. Where the accounting grew out of a contract made by the parties in 1845, in relation to growing hops, the auditors in adjusting the accounts of the parties, would be confined to the dealings growing out of the contract. *Id.*
3. And where by the terms of the contract, the hops raised or their proceeds, when prepared for market, were to be equally divided between the parties, and the defendant took the plaintiff's share to market without his knowledge or consent, —*Held*—that defendant could not charge plaintiff with the freight and commission for selling said hops, as the obvious meaning of the contract is, that if a sale was made by their mutual consent, the avails were to be divided equally; but if not sold in that manner the hops were to be divided, and each party receive their proportion. *Id.*

ADMINISTRATOR.

Where an administrator parts with the property or the money of the intestate and takes a note for the same, he becomes personally liable, and a debtor to the estate of his intestate, and may therefore hold the note as his own. *Rix, Admr. v. Nevins*, 384.

See PROBATE COURT, 5. PRESUMPTION, 1.

ADVANCEMENT.

1. The declarations of an intestate, whether made at the time of making the entries in his book against his children, or afterwards, are inadmissible as evidence of the intention of the intestate in making such entries. *Weatherhead et al. v. Field, Admr.*, 665.

2. Whether such charges were intended by the intestate as an advancement, must be evidenced by the book, and the intention of the intestate gathered from the book, and parol testimony is inadmissible to control the intention of the intestate. *Ib.*

AMENDMENT.

The omission to state in the record of a proceeding before a justice for a violation of a penal statute, the amount of costs taxed in said proceeding before the magistrate, is not a fatal defect, though regularly it should be entered upon the record; but if it appears in the mittimus, it is a sufficient matter by which to amend the record, as the magistrate is always allowed to amend when there is anything in the papers to amend by. *Howard, ex parte*, 205.

APPEAL.

1. If a party commence a suit before a justice, and takes an appeal from the judgment of the justice, and afterwards pays the costs in settlement of the suit, twelve days before the sitting of the county court, and neglects to prosecute the appeal in the appellate court, it will operate as a *retrazit*, "or an open and voluntary renunciation of the suit;" and in such a case it is a bar to any action for the same cause or duty. See *Callin v. Taylor et al.*, 18 Vt. 104. *Small v. Haskins et al.*, 209.
2. An appeal from the judgment of a justice, vacates and renders the judgment null, and when the judgment of a justice is thus vacated, there is no existing judgment which will conclude the parties, as a matter of evidence, or which can be relied upon as a matter of estoppel. *Ib.*
3. And where the plaintiff, in the present suit, had previously commenced a suit against these defendants, before a justice, for a trespass on the same premises, (this suit being for other trespasses on the said premises,) and appealed from the judgment of the justice, which was adverse to him, and twelve days before the sitting of the county court paid the costs in settlement of said suit, it was held, that the judgment of the justice, having been vacated by the appeal, and never affirmed, or prosecuted to judgment in the appellate court, there had been no adjudication on the question of title to those premises, and no existing judgment which concludes the parties, as a matter of evidence for that purpose. *Ib.*

See PARTIES, 8.

APPORTIONMENT OF DAMAGES. See HIGHWAYS 1.

ARBITRATION.

1. Where the parties mutually agree upon a reference of a suit; by the practice in this state it is understood, that the subject matter of the suit is referred, without reference to the form, and the referee may decide the case upon its merits, upon any state of evidence, which could be admitted by any amendment, in the power of the court to grant; and when the parties refer the case, "to be decided according to law," this limitation in the rule of reference, upon the power of the referee, is to be understood to refer to the merits of the case, rather than to the form of the issue. *Briggs v. Oaks et al.*, 188.
2. *Davis v. Campbell*, 23 Vt. 236. *Eddy v. Sprague*, 10 Vt. 216, and *Margolis v.*

Scott, 17 Vt. 634, cited with approbation, as to the practice in this state, in regard to the reference of causes. *Ib.*

3. Where a case is referred, the reference will not fail, even where it appears on trial, that the party has mistaken his form of action. *REDFIELD*, Ch. J. *Ib.*
4. Under the practice in this state, it is understood, that when the case is referred, this will allow the plaintiff to present any case, which he could have shown in court, either on his first declaration, or any declaration which it was competent for the court to allow him to file. *Briggs v. Bennett & Others*, 146.
5. The power and duties of selectmen are given and limited by statute, and when they cannot agree, with the person interested in lands taken for a highway, upon the damages, they may submit the same to arbitrators; but they can only submit those matters proper to be considered in ascertaining the damages sustained by taking the land for which they, as selectmen, are authorized to make compensation; and the arbitrators in ascertaining the damages are confined to such facts and matters, as could be taken into consideration by the selectmen. *Dabrymple v. Whittingham*, 345.
6. And in ascertaining the damages for land so taken for a highway, the only matters proper to be considered are "the value of the land taken, the expense of fencing against the road, and the damage done to the land remaining." *Ib.*
7. And where the arbitrators, in ascertaining damages, took into consideration the injury sustained by the plaintiff by the discontinuance of the old highway, and the expense of building a cross road on plaintiff's land, it was held, that these matters were not within the submission, as the selectmen, under the statute could not have made compensation for either of those matters, and, therefore, could not legally submit them to arbitration. *Ib.*
8. And where the selectmen of a town and the plaintiff, by express agreement, submitted all the matters passed upon by the arbitrators, but the submission as to some of the matters was not binding on the town, and the arbitrators verbally published their award, which consisted of distinct findings on distinct matters, having no connection—*Held*—that it is competent for the plaintiff to declare in assumpsit for the aggregate amount of the award, and that those matters improperly allowed and which can thus be definitely ascertained and computed, may be disallowed, and a recovery had by the plaintiff for the balance, or upon that part of the award which was good and legal. *Ib.*
9. And where the arbitrators made up their award of distinct sums, awarded on distinct matters, having no connection with each other, and so verbally publish their award to the parties; the statement of the aggregate amount of the award by the arbitrators will not render the award entire and indivisible; nor will such an effect be produced if, after so publishing the award, they give to one of the parties, at their request, a written statement of the amount of the award, intended for the use of the party and not as a publication of the award. *Ib.*
10. Where the submission is by deed under seal, and an award is made in pursuance to the submission, the award is a bar to any suit afterwards brought on notes or other matters, intentionally withheld from the examination and decision of the arbitrators, if they were included in the submission. *Robinson v. Morse*, 392.

11. *Query*.—Whether, under the same state of facts, an award on a parol submission would not have the same effect. *Id.*
12. But if the omission to present the notes or other matters to the arbitrators, arose from any mistake, forgetfulness or accident, &c., then the matter may be replied to the plea in bar, and the question directly presented, (whether under any of these circumstances, the award will be a bar to a suit for the recovery of claims so omitted in the award. *Id.*
13. Where parties make a submission to arbitrators, and by bond bind themselves to abide by and perform the award, the fact that the arbitrators, in making their award, state their decision in detail upon each claim, thus making a succession of awards, will not vitiate the award. *Kendrick v. Turbell*, 416.
14. Nor will the fact, that the arbitrators, in so making their award, do not strike the final balance, but find the balance on each claim, giving to each party the balance coming in his favor, thus leaving the final balance for matter of computation, be fatal to the award. *Id.*
15. All reasonable presumptions will be made in favor of an award, as much as in favor of a judgment; and the party objecting to the legality of an award, must show clearly the fact of its illegality. *Id.*
16. And where the plaintiff and defendant made their submission by bond, and the award was made in detail on each claim, the arbitrators giving to each party the balance coming in his favor, without striking the final balance, this being matter of computation, and the plaintiff brought his suit on the bond for non-performance of the award by the defendant, it was held, that his remedy was properly on the bond, and that if defendant withheld the portion of the award in his favor, the plaintiff might have judgment on that portion in his favor; and that there was no error because the judgment was so rendered, and afterwards, (under a rule of court,) the balance found due the defendant was deducted. *Id.*
17. Where the parties had submitted verbally their accounts to arbitration and the effect of the award and a note, given at the time, upon the whole account was in dispute, and the whole account, exceeding \$100, the plaintiff, to test the effect of the said award and note, upon the whole account, and to recover for an item of \$3,20 not passed upon by the arbitrator, brought his action in the county court—*Held*—that the county court, under this state of facts, clearly had jurisdiction, and that the plaintiff is entitled to recover the said item not passed upon by the arbitrator, though the award was held conclusive upon the matters passed upon by the arbitrator. *Emmox v. Pratt*, 630.
18. An award, on a parol submission, will be conclusive upon all the matters passed upon by the arbitrator, though the parties misapprehended the legal effect of the submission and award, unless it fairly appears, that the parties did not intend a submission and award, in the common sense of these terms.

ASSIGNMENT.

1. Until notice of an assignment is given to the debtor, the rights and interests of the debtor, are in no way affected by the assignment, and the same evidence, that would be admissible as between original parties, is admissible as against the assignee. *Loomis & Jackson v. Loomis*, 198

2. A deed of assignment by a debtor for the benefit of creditors, thus specified the powers of the assignees. "They shall forthwith take possession of the same, and faithfully, and as soon as practicable, and in the most beneficial manner, dispose of and convert into money the said real and personal estate, and collect the said choses in action, and apply the money therefrom arising, (after paying expenses,) in payment and discharge of the debts due the assignees, and for which they are holden as sureties, and pay the surplus to Low, (the assignor,) or to such persons as he shall appoint;"—*Held*—

I. That this did not give the assignees power to sell on credit, nor

II. Power to compound with debtors.

III. That it did not involve a violation of the statute against fraudulent conveyances, nor

IV. A violation of the statute of 1843, against general assignments, for the benefit of creditors. *Mussey et al. v. Noyes et al.*, 462.

3. The characteristics which must determine whether an assignment is general or special. *Id.*

4. The act of 1843, prohibiting general assignments, should be construed so as to be confined to such transfers of property as are made in trust for creditors. *Peck & Co. v. Merrill & Tr.*, 686.

5. And a transfer by a debtor of all his property does not make of itself what is termed a general assignment, unless it also be conveyed to trustees, to be held by them in trust for other creditors. *Id.*

6. And if a debtor conveys his property directly to creditors or sureties for their benefit, and no trust is created for others, the transfer must then be regarded as a mortgage or pledge of personal property; and in such case, the creditor or surety cannot be held as the trustee of the debtor, unless there is a surplus left in his hands, after discharging his claim against or liability for the debtor. *Id.*

ASSUMPSIT. See INTEREST 1; BOOK ACCOUNT 3; SURETY 1, 2; PARTNERSHIP 12.

ATTACHMENT.

1. Where an officer attached and removed a quantity of lumber, and in his return, as regarded the lumber, set forth that, "also on the same 4th day of September, 1847, I attached about 6000 feet of pine lumber," &c.; it was held, after judgment in the suit upon which the lumber was attached, that the return, with such reasonable intendments, as the court is bound to make, must be regarded as sufficient to create a *lien*, though the return might not have been good upon a plea of abatement. *Fletcher v. Cole*, 170.

2. And where it appeared that the lumber so attached was in a mill yard, which belonged to a third person, and that the officer, upon making the attachment, moved the lumber from one to four rods; this removal was held sufficient to constitute an attachment, or to make the officer liable to the debtor for the property, after the creditor's *lien* was gone. *Id.*

3. If an officer attach property owned by two, as tenants in common, upon debts of both tenants, and proceeds to sell it upon the writs of attachment, he must ordinarily notify all the parties to the writs or attachments, of the appraisal, under the statute, and if one of the tenants has no notice of the appraisal, it will be, so far as he is concerned, the same as if no appraisal had been made. *Gassett v. Sergeant*, 424.
4. And the officer, having taken the property from the joint possession of both co-tenants, may surrender it to either. *Ib.*
5. And an officer attaching property in any case, may, if he choose, deliver the property to the creditor for safe keeping, during the pendency of the suit, and as security for the re-delivery of the property, take its value in money of the creditor; and of this the debtor cannot complain during the pendency of the suit. *Ib.*
6. The defendant, as constable, attached a quantity of cheese, which was the joint property of the plaintiff and one S., on writs of attachment against both tenants; the cheese was appraised without the knowledge of the plaintiff, and S., the co-tenant, deposited with the defendant, the appraised or agreed value of the cheese, and the defendant delivered the same to S., the suit against the plaintiff having been determined in his favor, and after a demand of the cheese of the defendant, he brought his action of trover for the same—*Held*—under these facts, that defendant's proceedings with the property were not equivalent to a public sale of the whole of the cheese, nor was the defendant guilty of a conversion, and that the delivery of the cheese to S., one of the joint owners, was to all intents, a delivery to the plaintiff. *Ib.*
7. An officer has a right to take possession of boxes left at a depot for transportation, and open the same, and take on his attachment, any attachable articles therein. *Peeler v. Stebbins & Kenney*, 644.
8. But where boxes are so found at a depot, in which there is property exempt from attachment, the officer has no right to remove the same from the depot unnecessarily, and if the officer removes the boxes, and fails to show a necessity therefor, he is guilty of trespass. *Ib.*
9. Where an officer who was in the possession of a room and had permitted W. to store certain personal property in the same, and writs were put into his hands against W., and the officer attached the property in said room, and resumed exclusive possession of the room, and fastened the outer door so as to cut off all public access to it, though he neglected to fasten an inner door leading to a wood room,—*Held*—that the attachment was valid and sufficient to perfect the officer's right to the property. *State v. Barker et al.*, 647.
10. And if W. had a joint possession of the room with an officer, when under the authority of the process in his hands, the officer terminated that possession by fastening the outer door to the room, it constituted a legal attachment, under the authority of *Newton v. Adams*, 4 Vt. 437. *Ib.*

ATTORNEY. See NEGLIGENCE 1; PRINCIPAL AND AGENT 5.

AUDITA QUERELA.

1. Where property of a defendant residing out of the state is attached, and notice

- has not been given to the defendant, and judgment is rendered by default, before execution can issue, a recognizance for review must be entered, or the execution will be set aside on *audita querela*. *Eastman & Paige v. Waterman*, 494.
2. An execution issued by a justice of the peace for a sum exceeding \$53, by statute is required to be made returnable in 120 days, and if made returnable in 60 days, the execution will be held irregular and void. *Hovey v. Niles*, 541.
 3. In such cases the writ of *audita querela* is the proper remedy to set aside the execution, and the right to sustain this suit, will not be affected by the fact that the officer had not called upon the debtor, or made any effort to collect the execution, if the 60 days from the date of the execution had not expired when the suit was commenced. *Id.*
 4. The return of an officer is conclusive evidence, between the parties to a suit, that the defendant was notified of the time and place when and where the writ was returnable. *Witherell v. Goss & Delano*, 748.
 5. The return of the officer being conclusive, *audita querela* cannot be sustained to set aside the judgment for want of notice of the commencement and pendency of the suit. *Id.*
 6. And in such case if the party had no notice of the suit, he may have his remedy against the officer for a false return, or he may, under the provisions of the Comp. Stat. 281 § 8, 9, prefer his petition to the county court for relief. *Id.*

AUDITORS.

1. Auditors by statute, (Comp. Stat. 290 § 9,) are required in taking the account of the parties on book, to examine and adjust the same to the time of the audit; and the plaintiff is also entitled to hold any lien or security that he may have obtained by attachment, for the payment of the balance which he may recover. *Chaffee v. Malarkee et al.*, 242.
2. And whenever any creditor makes a subsequent attachment of the same property, it is made subject to this duty imposed by statute on the auditor, and also to this right given to the plaintiff, to hold the lien or security on the property attached. *Id.*
3. The rule would probably be otherwise, if there was actual fraud practised between the plaintiff and defendant, for the purpose of defeating the lien of the subsequent attaching creditors. *Id.*
4. Upon the report of an auditor or referee, all inferences of fact are to be made by the court, to which the report is returnable, and after such court have rendered judgment upon the report, if their judgment can fairly be sustained, by any inference of fact they might have drawn from the report, this court, as a court of error will presume they based the judgment upon such inference. *Wills & Fairbanks v. Judd*, 617.
5. When a case is recommitted to an auditor, it is matter of discretion with him, whether to require the parties to go over anew the whole trial, or not; but if the purposes of a recommitment were for a new trial, and the auditor improperly refuses to try the case anew, the proper place to set the matter right, is in the county court. *Mason v. Potter*, 722.

AWARD. *See* ARBITRATION.

BANKRUPTCY.

It is now settled law in this state, that a certificate obtained by a bankrupt, under the act of Congress of 1841, is a bar to an action upon a judgment, recovered pending the proceedings in bankruptcy, and before the granting of the certificate, upon a debt due at the time of the decree of bankruptcy; and the costs, accruing upon the debt after the decree and before the granting of the certificate, follow the debt, in this respect. *See Harrington v. McNaughton*, 20 Vt. 298. *Downer v. Rowell*, 397.

See CONDITION PRECEDENT 1; PROMISSORY NOTES AND BILLS OF EXCHANGE 16, 16, 17.

BAILMENT. *See* COMMON CARRIERS.

BASTARDY.

1. A bastard child, born out of the state, its mother at the time having no domicile within the state, cannot be affiliated, or its maintenance charged upon the father under our statute. *See Graham v. Monsergh*, 22 Vt. 548. *Eggleston v. Battles*, 548.
2. But if the mother is, at the time of the birth of the child, *bona fide* an inhabitant of the state, and the birth of the child, by accident, or during a temporary absence, occurs out of the state, the mother may have her remedy under the statute, against the father. *Ib.*
3. And if there is evidence tending to show the residence of the mother to be in the state, at the time, though the birth of the child occurred out of the state, the evidence should be submitted to the jury on the question of residence. *Ib.*
4. By the provisions of the act of 1821, and also Comp. Stat. 865 § 5, if the parents of an illegitimate child intermarry, and recognize and treat such child as their own, it will render the child legitimate, the same as if born in lawful wedlock, and the child will take the settlement of the father, as one of the legal consequences resulting from such act of legitimation. *Rockingham v. Mount Holly*, 653.
5. In a case of bastardy, the liability of the bail, on the recognizance taken before the magistrate, may be discharged by a surrender of the principal, at the term, when he is required to make his appearance. *Humphrey et ux. v. Casson*, 760.
6. But the mere attendance of the principal in court to defend the suit, is not sufficient to discharge the bail, there must be a formal surrender of the principal into the custody of the court, and an *exoneretur* entered upon the record in discharge of the bail. *Ib.*
7. And if no such surrender is made, or recognizance entered into at that term of the court, the recognizance taken before the magistrate is forfeited, and stands as security for the payment of such sums of money, as may be ordered for the support of the child. *Ib.*
8. If the mother execute a release to the principal, neither he or his bail can avail

themselves of it while the overseer legally controls the prosecution, under the statute, for the benefit of the town; but if the interest of the overseer have ceased, and the mother prosecutes the suit for her benefit, such release pleaded in bar, is a good defense as to her; and if the town are not entitled to the sums of money ordered to be paid, then she cannot claim it against her release. *Id.*

BETTERMENTS.

A declaration for betterments, filed in action of ejectment, is a mere adjunct to the action of ejectment, and does not come within the provisions of the statute, (Comp. Stat. § 221 § 17,) giving a right of review, and in a cause or suit founded on such a declaration, neither party is entitled to a review. *Allen v. Taylor et al.*, 599.

BILLS OF SALE. See EVIDENCE 5.

BOND.

1. Where the defendant gave the plaintiff a penal bond, conditioned that he would build a certain house for J. by the first day of August, A. D. 1849, and save the plaintiff harmless from all liability on plaintiff's contract to build the said house, and the defendant failed to build the house by the time specified, and the plaintiff commenced a suit upon said bond, and after the commencement of said suit, the plaintiff was compelled to finish said house at the expense of about seventy dollars, *it was held*, that this expense should be included in the assessment of the damages, it being found by the referee, to whom the case was referred, that there had been a breach of said bond when the suit was brought. *Spear v. Slacy*, 61.
2. And if the bond be treated as a bond of indemnity, it was sufficient to sustain the action, that there had been a breach of its condition when the action was brought. *Id.*
3. Damages on bonds of indemnity, are always assessed up to the time of trial. *Id.*

BOOK ACCOUNT.

1. Where the plaintiff's account was over one hundred dollars, but he and the defendant had looked over the account, at the end of every week, and the balance was carried on to the account of the next week, and so from week to week until the parties had a final settlement or looking over, and found the balance due plaintiff to be \$97.00; the plaintiff called upon the defendant to pay this sum; he neglecting to pay it, the plaintiff brought the present suit, insisting that the whole account between himself and defendant was an open book account; upon this state of facts *it was held*, that the settlement was not a merger of all the previous dealings, between the parties, and that the county court had jurisdiction of the suit. *Clark v. Edgell*, 108.
2. It was also *held*, that though assumpsit may lie upon an implied promise to pay the balance found due; yet that does not preclude the general action of assumpsit for goods sold and delivered, and the settlement might be used as evidence to regulate the sum to be recovered. *Id.*
3. Where property is sold conditionally, and payments are made for it by way of services, the services may be charged on book to await their subsequent applica-

tion; and if the property so sold is received back by the vendor, the vendee may recover for his services in an action on book, if no application has been made of the services. It was so held in *Stone v. Puleifer*, 16 Vt. 423. *Martin v. Eames & Bellows*, 476.

See SALE 3; JUSTICE OF THE PEACE 1, 2.

CASES OVERRULED, QUESTIONED AND CONSIDERED.

The case of *Lovell v. Leland*, 3 Vt. 581, considered and affirmed; and *Strong v. Strong*, 2 Aiken 373, modified and overruled so far as it conflicts in principle with the doctrine held in *Lovell v. Leland*. *Paris v. Hulet*, 308.

See ARBITRATION 2.

CASE. See RAILROAD COMPANIES.

CHANCERY.

1. The statute in relation to the rights of married women, (Comp. Stat. 403 § 16,) provides that "The rents, issues and profits of the real estate of any married woman, and the interest of her husband in her right in any real estate, which belonged to her before marriage, or which she may have acquired by gift, grant, devise or inheritance, during coverture, shall during coverture, be exempt from attachment or levy of execution for the sole debts of her husband; and no conveyance made during coverture, by such husband, of such rents, issues and profits, or of any interest in such real estate shall be valid, unless the same be by deed, executed by the wife jointly with the husband, and acknowledged by her, &c." It was held that this statute embraces all the rights in real estate which the wife shall acquire during coverture, as well as the rights in real estate acquired by her before marriage. And it was also held that the word "grant" applies to all conveyances by deed which are not gifts. *Peck et al. v. Walton*, 82.
2. Held also that the statute applies to all future conveyances made by the husband, whether the coverture existed at the date of the statute or not. *Id.*
3. Held also, that the statute cannot be regarded as having deprived the husband of any rights which were not clearly subject to the control of the legislature; and that the legislature may at all times prescribe the mode of conveying property, and especially real property. *Id.*
4. And where the statute declares certain conveyances of the husband's interest in the wife's land, as invalid unless the wife join, and the objection is brought to the notice of the court even by the husband himself, this court cannot pronounce a decree based upon the validity of such conveyance. *Id.*
5. Where A. B. C. and D. entered into a contract or mutual agreement, to purchase a certain patent, and by the terms of the contract, they were each to pay but one-fourth of the amount paid for the patent, and all were to share in making that payment, so that one should pay no more than the other; and C. and D., by an arrangement with the vendor of the patent, paid little or nothing, but the sum actually paid was taken from A. and B., they at the time supposing that they were paying no more than C. and D., it was held, that this was fraudulent upon A. and B., and that upon an accounting in relation to this matter, A. and

- B. should charge C. and D. with an equal proportion of the money, which they had paid, so that in the purchase of said patent, both C. and D. shall pay as much for their interest in the same, as A. and B. pay for their interest in said patent. *Penniman et al. v. Munson et al.*, 164.
6. It was also *held*, that though the mere act of conveying to each of the parties an undivided interest in the patent so purchased by A. B. C. and D., did not create among them the relation of partners, yet, when they, after that purchase was made, agreed to convert their separate rights into a common interest, for the purpose of selling the patent, and agreed to divide the net proceeds equally between them, a partnership was created, and such a relation then existed, that each had the right to call the others to account for the avails they respectively had received. *Id.*
7. It is settled law in this state, that a decree in chancery, and an expiration of the time of redemption, and a possession taken under the decree, operates as a satisfaction of the mortgage notes, if the property is adequate for that purpose, and if not adequate, it operates as a payment *pro tanto*. *Paris v. Hulett*, 308.
8. And the effect of a decree of foreclosure is the same, whether obtained upon a bill in chancery, or an action of ejectment. *Id.*
9. In an application for a new trial, where the case has been determined at law, chancery will not grant relief, unless it appears that the party has failed of obtaining redress in the suit at law by the fraud of the opposite party, or through inevitable accident or mistake, without any default either of the party or his counsel. *Burton v. Wiley*, 480.
10. And where in the court of law, it was left to the choice of the counsel of the party, either to take a judgment for nominal damages, or have the case sent to the court below for a new trial, and from a misapprehension of facts, the counsel elected to take the judgment, and such a judgment will be liable to do the party injustice, and the time prescribed by statute to petition for a new trial had elapsed, and the party brought his bill in chancery for a new trial or other relief—*Held*—that these facts do not bring the party within the rule, or afford ground for relief in chancery. *Id.*
11. That a party, in such a case, is without redress in the court of law, and that the time has elapsed to petition for a new trial, forms no substantive ground for relief in equity. *Id.*
12. Where a bill in chancery is dismissed with costs, for the want of an appearance and prosecution by the orator, and not on its merits, the decree dismissing the bill will not operate as a bar to a suit founded upon the same matters, but under such circumstances, the dismissal of the bill will be the same as a non-suit at law. *Porter v. Vaughn et al.*, 624.
13. Where A. executes his note to B., for a given sum payable at a future day with interest annually, and for this note B. agrees in writing, if the same is paid when due, to convey the premises, for which the note was given, and A. goes into possession of the premises, under a lease, therein agreeing to pay a stipulated rent, if the note is not paid when it falls due according to its tenor, and A. continues in possession under the contract and lease, and the note is not paid when due; if B. then elects to treat the contract as abandoned, and instead of an-

forcing the payment of the note, resumes the possession of the premises, and permits A. to remain under a lease, in which he reserves rent to himself, thus establishing the relation of landlord and tenant between himself and A., and this by their mutual arrangement; it will operate as a disaffirmance of the contract on the part of B., and a resumption of the premises in his own right, and the note must be regarded and treated as paid when B. thus takes possession of the premises as his own; and after this B. can no more enforce the collection of the note against A., than if he had brought ejectment to recover possession of the premises, upon the neglect of A. to pay the note as stipulated, and had obtained possession of the premises thereby. *Id.*

14. Nor can B., after thus resuming the possession of the premises, and reserving rent to himself, enforce the collection of interest on such note. *Id.*

15. The defendant bought a farm for which she was to pay \$700, and paid \$500, and her husband joined with her and mortgaged the same to secure the payment of the said \$200; subsequently she conveyed a certain portion of the farm to him and he agreed to pay the \$200; after this, defendant was divorced from her husband, and he neglecting to pay the \$200, the mortgagee foreclosed, and she, with certain creditors of her husband who had levied upon the farm for debts of her husband, joined with them and paid off the mortgage in the proportion of their claims; it turned out that the levies were defective and void, and they brought their bill in chancery to compel her to refund the money so advanced by them, she having subsequently levied upon the interest of her late husband to enforce payment of the money advanced by her for the redemption of the farm—*Held*—that plaintiffs were chargeable with notice of the equity resting upon the land on which their levies were made; and that under the circumstances, defendant had a right to secure her debt on the property of her late husband, and having done so, she is not only the first in diligence, but the first in right. *Stevens et al. v. Goodenough*, 676.

16. *It was also held*, that defendant had the right, by subrogation, to the remedies and securities in the hands of the mortgagee to compel payment from G. (her late husband) or from those claiming under him; and the payment by defendant having been after her divorce from G., she had the right to prosecute G. for the money paid, and levy her execution upon G's. property for its satisfaction. *Id.*

See INTEREST 2; PROBATE COURT 5.

COLLECTOR. See TAXES.

COMMON CARRIERS.

1. A Railway Company that transport cattle and live stock for hire, for such persons as choose to employ them, thereby assume and take upon themselves the relation of common carriers, and with the relation, the duties and obligations which grow out of it; and they are none the less common carriers from the fact that the transportation of cattle is not their principal business or employment. *Kimball v. Rut. & Burl. R. R. Co.*, 247.

2. A common carrier may by special contract with the owner of the property to be transported, so change his relation as to become a private carrier, and when the relation is so changed, his liability is measured by the specific provisions of his contract; but a general notice to the public, limiting his obligations as a com-

mon carrier, will afford no evidence of such contract, even if the existence and contents of such notice is brought home to the party. *Ib.*

3. And where a Railway Company, (the defendants,) for a given reward or hire, proffered to become, and to assume the relation of common carriers; and for a less reward or hire proffered, in the exercise of reasonable care, to furnish the necessary means of transportation, such as cars, motive power, &c., that the owner might be his own carrier; thus graduating the rate of compensation to the degree of risk assumed, and leaving either mode of transportation to be adopted at the option of the owner of the stock; and the plaintiff, who had cattle to be transported, elected to pay the lower rate—*held*—that he was bound by his election, and that he could not hold the company as common carriers, for damage to his cattle. *Ib.*
4. In the present case, a special contract was found, under which the defendants, in the exercise of reasonable care, were to furnish the plaintiff with a suitable car, and other necessary means of transportation, and the plaintiff was to assume the risk and general responsibility of the transportation of his cattle—*held*—under this contract, that the defendants were not common carriers, but were *pro hac vice* private carriers merely. *Ib.*
5. And the plaintiff having declared against the defendants as common carriers, the question whether such a special contract was made, is purely one of law. *Ib.*
6. And when the relation is changed from common to private carriers by special contract, the company not being liable as common carriers, cannot be declared against as such, but the action must be on the contract, or for a breach of duty arising out of the contract. *Ib.*

COMMITMENT. *See* CRIMINAL LAW.

CONDITION PRECEDENT.

Where the plaintiff relied upon a new promise to avoid a plea of bankruptcy, and the evidence showed a promise to pay when the defendant was of sufficient ability, *it was held*, that his being of sufficient ability to pay is a condition precedent; and that the promise can be of no avail until the condition is complied with. *Sherman v. Hobart & Trustees*, 60.

See CONTRACT 7; LANDLORD AND TENANT 6.

CONDITIONAL SALE. *See* BOOK ACCOUNT 1; TRESPASS 8; SALE 5, 6.

CONSIDERATION. *See* CONTRACT.

CONSTABLE AND COLLECTOR. *See* TAXES; PRACTICE 2, 3.

CONSTRUCTIVE POSSESSION. *See* POSSESSION.

CONSTRUCTION OF CONTRACTS. *See* CONTRACTS.

CONTRACT.

1. Where a contract was made between the plaintiffs and the defendant and B., a

third person, that the defendant should employ B. to build a saw mill, and that defendant should pay to the plaintiffs the amount of B.'s earnings, to be applied on a debt which B. had previously contracted with the plaintiffs; there was also a contract between the defendant and B. that if the mill did not do a good business, defendant need not pay anything; it turned out that the mill was good for nothing, and that the labor of B. was a damage to the defendant; under this state of facts, *it was held*, that the plaintiffs could not enforce payment of B.'s wages, (though they were ignorant of the last named contract between the defendant and B.,) as the defendant received no value for his promise to the plaintiffs, and the plaintiffs parted with nothing, their debt having been previously contracted with B. *Hurlbut & Hodges v. Chittenden*, 52.

2. In the construction of instruments or contracts, the first rule to be regarded is to make them speak the intention of the parties, as gathered from the entire transaction. All other rules are subordinate to this one, and when they contravene it are to be disregarded. (See 11 Vt. 583.) *Rood et al. v. Johnson*, 64.
3. One, who had contracted for a quantity of wood, and received the wood, and used it mostly without objection, and then paid for most of it without objection, would after this be precluded from raising either the question of fraud, or breach of warranty. *Cole v. Champlain Transportation Co.*, 87.
4. And where the defendants bought a quantity of wood of the plaintiff, which, by the terms of their written contract, was to be placed upon the lake shore and measured by one Boardman, *it was held*, that if the plaintiff properly placed the wood upon the shore, under the contract, it was a waiver of the condition, in the contract, that the wood should be measured and surveyed by B., when the defendants, by their agents, removed and used it. *Id.*
5. It was also *held*, that if defendants did not intend to pay for the wood thus placed there under the contract, on the ground that the quality of the wood was inferior to the plaintiff's representations, or for other reasons, it was the business of the defendants to see to it that their servants did not remove and use it, and that after having allowed them to do so, the defendants must pay for it. *Id.*
6. Where the plaintiff had contracted to lay a given quantity of floor in a certain building, and by the terms of the contract, the defendants were to furnish the boards, well seasoned, and neglected to furnish them as they were wanted by the plaintiff, and the plaintiff abandoned the job, *it was held*, that the plaintiff was entitled to recover for what he had done. *Hill v. Hovey et al.*, 109.
7. And where the defendants, by the terms of their contract, assume to see the boards furnished as they should be wanted by plaintiff to lay the floor, it is a condition precedent to the performance of the contract, on the part of the plaintiff, to lay the floor. *Id.*
8. The plaintiff was under no obligation to make a special demand on the defendants for the boards, as it was equally within the means of the knowledge of the defendants, as of the plaintiff, when they would be wanted to enable the work to progress. *Id.*
9. In all cases where the contract grows immediately out of, or is connected with an illegal act, so that it becomes necessary to prove the illegal act, to enable the

- plaintiff to recover, then the contract is so far connected with the illegal act, that there can be no recovery on the contract. *Buck v. Abes*, 184.
10. But if the contract be so far unconnected with the illegal act, as to be founded upon a new consideration, it may be enforced. *Id.*
 11. Judicial tribunals will not lend their aid to enforce an illegal contract, or a contract growing out of an illegal act, but will leave the parties in the situation where they placed themselves. *Id.*
 12. And where the plaintiff, with others, was interested in a quantity of spiritous liquor, which was placed, by a mutual arrangement between the parties, in the hands of the defendant to sell, and he sold the same, in violation of the license law of 1846, and the plaintiff derived his title to a portion of the money received by the defendant upon such sale, through that arrangement or contract, and it also being necessary for the plaintiff, in order to sustain his action, to prove the arrangement under which the liquor went into the hands of the defendant, and the illegal sale itself, *it was held*, that the contract was so connected with the illegal sale of the liquor, that the plaintiff could not recover any portion of the money received upon such sale, by the defendant. *Id.*
 13. It was agreed between the plaintiff and H., at a constable's sale, that plaintiff should bid off a quantity of hay, and divide it, and that H. should not bid. If the plaintiff bid off the hay and H. did not bid, this would constitute a consideration for the contract; but *quære*, whether such a consideration is allowable. But if the contract is valid, no property will pass while the contract is merely executory; and no property will vest in H., until he has paid or tendered the price. *Paige v. Hammond et al.*, 375.
 14. And if there was evidence of a present executed contract of sale of a third of the hay, in common to H., still plaintiff had a right, by the general rules of law, to retain the thing until he was paid his money, for the price. *Id.*
 15. Where a contract requires concurrent acts of either party, the denial of the contract by one party will not enable the other party to sue upon it, without showing a readiness, at least, to perform on his part. *Id.*
 16. A contract for the sale of property, which is merely what is termed a refusal of the property by one of the parties, leaving it optional with the other party whether he will take the property within a certain time or not, unless upon some other consideration, or under seal, would not be valid in law, for want of consideration. *Faulkner v. Hebard*, 452.
 17. But where F. and H. entered into a written contract, by the terms of which H., in consideration of a certain number of shares of stock in the Vermont Central Railroad Co., "to be delivered to me, (H.), by F., on or before the first day of July, 1850," agreed to sell and convey certain property to F., and this contract was signed by both parties—*Held*—that the contract was upon sufficient consideration; and that both parties are bound to do what is specified in the contract to be done on his part; and that if F. had declined to deliver the stock according to the terms of the contract, an action would lie upon the contract, for the refusal. *Id.*
 18. And in such a contract, the delivery of the stock, and the conveyance of the property, are *concurrent acts*; and as the one promise is the entire consideration

of the other, neither party would be bound to absolutely convey his property, except upon the conveyance by the other. *Ib.*

19. But either party, claiming damages for non-fulfillment of the contract, must either show a readiness, and offer to perform on his part, or that he was excused therefrom by the consent or the conduct of the other party. *Ib.*

20. The directors of the Railroad Company, by letting in those who paid but \$90, to an equal participation in the profits of the Company with those who paid \$100, lessened the market value of the stock which F. by the contract sold to H.: *it was held*, that if this act of the directors was a legal one, then it was one which H. was bound to know they might do, and would therefore form one of the contingencies of H.'s purchase; and whether the act of the directors was before or after the actual time of sale, would no more affect the validity of the sale, than any other legal act of theirs; but if the act was an unlawful exercise of authority, by the directors, then H. when he became a stockholder might resist it in any legal way; and therefore will form no defense for H. in a suit for a non-performance of the contract. *Ib.*

21. M. under a special contract, undertook to construct a certain number of charcoal kilns for C., but did not construct the same strictly according to the terms of the contract, though his labor was of some benefit to C.; under these facts, M. may recover on *quantum meruit*, as much as his labor is worth to C., unless C. does something amounting to an acceptance of the work, or to a waiver of his claim for a deduction. *Morrison v. Cummings*, 486.

22. A mere use of the kilns without objection, where the defect is not apparent, but one that could only be discovered by use, will not amount to such acceptance of the work, or waiver of his claim for a deduction. *Ib.*

23. So also, a part payment for the labor of M., can only be regarded as an acquiescence, to that extent. *Ib.*

24. If A. agrees to take a debt of B. against a third person, as payment, *in present*, he will be bound by it, and it will amount to a virtual purchase of the claim and an agreement to accept it as payment *pro tanto*, upon A.'s claim against B. *Hayden v. Johnson*, 768.

See ACCOUNT 3; CHANCERY 5; EVIDENCE 5; FRAUD STATUTE OF 1; SALE 1, 2.

COVENANT.

1. In an action of covenant, upon the covenants of warranty, in a deed, if the covenantee have bought in an elder and better title, and which was asserted against him, this is equivalent to an eviction, and is a breach of the covenant. *Turner et al. v. Goodrich*, 707.

2. But in such case the covenantee assumes the risk of proving the title so bought in, to have been elder and better than the title derived from his grantor. *Ib.*

3. To avoid this hazard, he must have given notice to his covenantor to defend against such title, and waited to be actually evicted, by judgment of the proper tribunal. *Ib.*

4. In such case, the covenantee is entitled to recover the amount necessarily paid,

to buy the outstanding title, with necessary costs and expenses. *Id.*

See CONVEYANCE.

CONVEYANCE.

1. The Constitution of this state adopted in 1777, required, in general terms, that all conveyances of land should be recorded in the town clerk's office; and in 1779 the Legislature passed an act in accordance with such provision, requiring such conveyances to be acknowledged and recorded in such office; *it was held* that these provisions had exclusive reference to such conveyances of land only, as operated *inter vivos*, and not to mere devises of land. *Smith v. Perry, Admr*, 279.
2. And so in an action of covenant broken, *it was held*, that a will, that came in force at that time, was admissible in evidence, as tending to prove that the recovery of the land, in question, was by elder and better title than that of the covenantor, though the will had not been recorded in the town clerk's office. *Id.*
3. And the plaintiff also offered the deed of B. and wife, of the premises in question to Reed, the defendant's intestate, the wife of B. being the daughter of the testator, and it appeared that the said deed was not sufficiently acknowledged by the *feme*; on objection, the deed was *held* admissible in evidence, to show claim of title by Reed, the intestate, and to show claim of title under the wife of B. *Id.*
4. And as Reed, the intestate, held the land under B., his possession would not become adverse to the heirs of the wife of B., until their right of entry accrued, which could not be during coverture, or the estate by courtesy. *Id.*
5. And where in a deed the first covenant was to M., the grantee, alone, and the *habendum* was expressed, in terms to the grantee, his heirs and assigns, and the covenant of warranty was general, "to warrant and defend the premises," not in terms to M. alone, while M. held them, but into whosoever hands they should come, *it was held* that this was not controlled by the preface that "I covenant with said M.," and that these covenants were operative after the grantee conveyed, and should be construed, as virtually in favor of any one seized of the estate. *Id.*
6. At common law, a covenant running with the land in the name of the *grantee only*, may be sued, by any one in the estate, at the time of breach. *Id.*
7. As a general rule, the right of the grantee, or any intermediate assignee, to sue upon the covenants, after parting with the estate, is absolutely dependent upon his having made satisfaction to the person evicted. But if the suit is brought for the benefit of the person evicted, and especially when the estate of the original warrantor, is in a course of settlement in insolvency, there seems no hazard of injustice, in giving judgment for the full amount of the value of the land, against the estate once, on condition that if any other allowance shall be obtained, the judgment shall be reduced to a nominal sum. And in the present case, the court so rendered judgment, the action having been brought by the grantor of the person evicted, but he had recovered judgment against the present plaintiff on the breach, and made no objection to the present suit, nor had he presented any claim against the estate of Reed. *Id.*

8. A surety for the grantor, in a fraudulent conveyance, is to be regarded as the party aggrieved by such conveyance, from the date of his suretyship, and before he pays any portion of the debt, and his right to recover the penalty given to the party aggrieved is perfected, by paying the debt, and dates from the time of his becoming surety. *Beach v. Boynton*, 725.

CRIMINAL LAW.

1. And when the mittimus only requires the jailer to keep the convict until he pay the fine and costs of commitment, and jailer's fees, the omission of the costs of prosecution will not render the commitment for fine and costs of commitment void. *Howard, Ex Parte*, 205.
2. In a commitment, for a violation of the license law, it is of no importance whether it is denominated a crime, or an offense, or neither. *Id.*
3. Proceedings before a magistrate for such offenses considered. *Id.*

CUSTOM OR USAGE.

1. The office of a custom or usage is strictly one of *exposition*, and is allowable to be given in evidence only as one means of arriving at the intention of the parties, and can never be received to thwart it, when it is clearly and full expressed. *Linsley v. Lovely*, 122.
2. The custom or usage set up in the present case, was, that there were a class of mercantile houses in the city of New York, in the same general line of trade with the plaintiff, that were generally known as "six months houses;" that by their general and uniform course of business, a bill made out in the manner of plaintiff's bill to defendant, it would be understood to be a sale on six months' credit, without any express stipulation to that effect between the parties; that this usage may discharge the office of *exposition*; *it was held*, it must be found to be the *general usage* of the whole of that class of houses in the city of New York, to which plaintiff belonged, and so well *established* and *uniformly acquiesced in*, and for such a length of time, that the jury might be fairly justified in inferring that it was known to the contracting parties, and that it entered into their minds and made, by implication, a part of their contract. *Id.*
3. And if such a custom or usage is not fairly proved, it should be laid wholly out the case; so, too, if the offer is not to prove such a custom or usage, the evidence should be excluded. *Id.*

See EVIDENCE 6.

DEPOSITIONS.

1. When a deposition is equivocal, the better rule is to admit the testimony, and leave the interpretation to the jury, with proper instructions from the court, though it is competent for the court to put its own construction upon the evidence. *Powers et al. v. Leach*, 270.
2. And where the witnesses in their depositions when testifying of the reputation of other witnesses for truth and veracity, used the terms, "character for truth, &c.," and "general character for truth, &c.," *it was held*, that character, gen-

eral character, report or reputation, when so used, are the same, and that the depositions were properly admitted. *Ib.*

3. If the caption and certificate to a deposition are drawn together, by the commissioner taking the deposition, and he affixes his official signature to that statement, the deposition will be admissible, for the commissioner in such a case, as fully certifies to the truth of all the facts required, as if the caption and certificate were drawn separately and his signature affixed to each. *Hausknecht v. Hovey*, 544.

4. The initials of a middle name is no part of the name, and the omission or misstatement of them in a deposition, in describing the parties or the deponent, forms no good ground of objection to the deposition. *Allen v. Taylor et al.*, 599.

DAMAGES. *See* BOND 1, 2.

DEBT ON BOND. *See* BOND.

DEED. *See* CONVEYANCE.

DRAWER AND ACCEPTOR. *See* PROMISSORY NOTES AND BILLS OF EXCHANGE.

EJECTMENT.

1. The mortgagee may recover rents and profits, by way of damages in ejectment either against the mortgagor, or any one in possession claiming title under him; and when the prior mortgagee gives no notice, the subsequent mortgagee may recover rents and profits from the service of his writ or notice. *Wires & Peck v. Nelson et al.*, 13.
2. And where the mortgagor and his tenants hold in severalty, the mortgagee may recover a joint judgment against the tenants and mortgagor, in possession of still another portion, for the rents and profits of the whole, if the tenants who hold in severalty, do not separate in their defense by a disclaimer. *Ib.*
3. In ejectment, if several plaintiffs count upon a joint title and right of possession, they must each and all show, that such legal title and right of possession exists, at the time of trial, as well as at the commencement of the suit, or they cannot sustain the action. *Cheney et al. v. Cheney et al.*, 606.
4. Evidence may be introduced under the general issue, in ejectment, where there are several plaintiffs, disproving their joint title and right of possession; for, it is the denial of a fact which the plaintiffs must in the first instance show in support of their action. *Ib.*
5. In an action of ejectment brought by the plaintiff, to recover, as tenant in common, an undivided part of the premises, on the ground of the defendant's refusal to recognize his rights as co-tenant, it appeared that both plaintiff and defendant claimed under one D., who first mortgaged the premises, in May 1846, to secure the mortgagees, for entering into a recognizance in the sum of \$250, for D's appearance, at the county court, in a criminal case; the recognizance became forfeit in May, 1846, and at that Term of court was chancered to \$100 and costs \$14. In February, 1847, one A. levied upon the whole of D's equity of redemption, treating the mortgage as an incumbrance to the full amount of

the recognizance of \$250; said A. in March, 1847, conveyed his interest to the defendant's grantor, who in May, 1847, conveyed by deed of warranty to the defendant. In December, 1847, the defendant's grantor paid \$114, the amount recovered on the said recognizance, and in November, 1848, the plaintiff levied upon an undivided portion of the premises; the same which the whole amount of the execution bore to the value of the premises. Under these facts, *it was held*, that the mortgage title must surmount, and override, any title which plaintiff could possibly obtain of D. of a date posterior to the title of the mortgage, which is now vested in defendant, and which will effectually prevent the plaintiff from recovering in ejectment, against the defendant. *Benton v. McFarland*, 610.

ERROR. See PRACTICE 1, 5.

ESTOPPEL.

1. The doctrine of collateral *estoppels* considered and discussed, by CHIEF JUSTICE REDFIELD, in an opinion which follows the opinion of the court by ISHAM, J., in this case. *Small v. Haskins et al*, 209.
2. He who by his words, or his actions, or his silence even, intentionally or carelessly, induces another to do an act which he would not otherwise have done, and which will prove injurious to him, if he is not allowed to insist upon the fulfillment of the expectation upon which he did the act, may insist upon such fulfillment; and equally if he has omitted to do any act, trusting upon the assurance of some other, thus given, and which omission will be prejudicial to him; if the assurance is not made good, he may insist it shall be made good. *Strong v. Ellsworth*, 866.
3. But where the plaintiff had a lien upon certain cattle in possession of T., and while so in his possession he sold them to defendant, and while defendant was passing with his drove, one W., informed plaintiff that defendant had bought the cattle, and pointed them out in the drove, and plaintiff supposed that W., to whom he had made known his lien, and who was solvent, had sold them to defendant, and would be accountable to him for the cattle, or his claim upon them; *it was held*, under this state of facts, that the omission of the plaintiff to notify defendant of his lien upon the cattle, did not operate as a waiver of his lien. *Ib.*
4. The plaintiff, in about one-half hour after the defendant so passed with the cattle, was informed that T. sold them to defendant—*Held*—that plaintiff was then under no obligation to pursue defendant and give him notice of his lien; but that he might at once have commenced his suit for the cattle, and that there would then have been no ground of estoppel; and that plaintiff did not sue as early as he might, is no ground of estoppel short of the term of the statute of limitations. *Ib.*
5. The plaintiffs commenced their action of trespass against one H. and the defendants, for thirty-two pine trees and some other timber; in the county court the plaintiffs recovered against the defendants for other timber, and a verdict passed in favor of H., who cut the said pine trees and sold them to the defendants, the plaintiffs failing to make out title to the land on which they were cut; and this verdict as to H. was final, and the case as to him was carried to the Supreme Court, and there affirmed; the defendants reviewed, and, at the trial, gave notice

of the final judgment in favor of H., as their defense so far as the cutting of the said pine trees are concerned; the plaintiffs failed to recover of the defendants, except for the said pine trees so cut by said H.; and the defendants claim that plaintiffs cannot recover of them, for the same trees—*Held*—that the judgment in favor of H. is a conclusive bar against a recovery by plaintiffs, and that it quieted the title to the trees in H., and that this bar must extend to all who stand in privity of estate with H. *Morgan et al. v. Barker et al.*, 602.

6. It is not important or necessary, that the estoppel, or bar, should exist before the commencement of the action. *Id.*

See APPEAL 2, 3; TRESPASS 7.

EVIDENCE.

1. The declarations of the testator made about the time of the execution of the will, tending to show importunity and undue influence, and also to show the mind of the testator are admissible. *Robinson, Exr. v. Hutchinson et al.*, 38.
2. But such declarations are not admissible to prove the fact stated. *Id.*
3. Weakness of mind arising from advanced age, disease and family affliction, exists in the mind itself, and such weakness of mind, at the time of making the will, may be inferred from weakness subsequent, therefore declarations of the testator, soon after making the will, and having reference to it, and the disposition of his property, under such a state of facts, are admissible. *Id.*
4. Testimony of this character must be limited to proof of weakness of mind, at the time of making the will, and is inadmissible as proof of the fact stated by the testator. *Id.*
5. If a bill of sale expresses the contract of the parties, it cannot be controlled by parol evidence any more than any other written contract. But where the bills of sale, as in the present case, simply state, that on a given day the defendant bought of the plaintiff certain articles, at given prices, with a memorandum on the margin, "six per cent off for cash," it was held that it did not import a contract, and that it was simply declaratory of a fact, and the defendant can show the true contract of the parties, consistent with these written declarations by parol evidence. *Linsley v. Lovely*, 123.
6. And the words indorsed on the bills "six per cent off for cash," being equivocal, it is competent to prove to the jury how they are understood by a custom or usage among men engaged in the same class of trade with the plaintiff. *Id.*
7. If a witness, who is interested, as a member of a certain firm, in the event of the suit, has executed a release of all claims, which he had as an individual or a partner in the firm, the release is sufficient, and he is a competent witness. *Id.*
8. And where a witness, who was assignee of the defendant, had sold and conveyed by covenants of warranty, a part of the real estate of the defendant, which had been attached by plaintiff, and witness held in his own hands ample indemnity, in case plaintiff recovers, out of which the judgment may be satisfied, his interest is too remote to affect his competency. *Id.*
9. And if a party call a witness, and have him sworn in chief, and examined,

though it be upon a question to the court touching the interest of another witness, still this will exclude the party calling him from objecting to the opposite party's examining him, upon the merits of the cause to the jury, for it is a waiver of the interest of the witness by the party so calling. *Id.*

10. It is competent for a witness, who as agent negotiated a trade for the principal, to testify how he understood the contract, at the time of the trade, as his understanding is the understanding of the principal; but it is not competent for him to testify how the other party, or the agent of the other party understood the contract, as this is the opinion of the witness, and a fact to be found by the jury. *Id.*
11. A witness, who was discharged of all interest at the time of the hearing, is admissible, notwithstanding that he was directly interested up to the time of trial, and that the discharge was made with the expectation of his becoming a witness. *Moore v. Rich*, 12 Vt. 563. *Fletcher v. Cble*, 176.
12. The admissions by one partner made after the dissolution of the firm and an assignment by him, in regard to the business of the firm previously transacted are admissible, as evidence against all the partners. *Loomis & Jackson v. Loomis*, 198.
13. Where one is a partner, and co-plaintiff on the record, and directly interested to sustain the suit, and is liable for costs, his interest is of such a character, that he cannot remove it by any act of his own, so as to become a competent witness against the consent of the defendant. *Id.*
14. It is not competent for one to introduce testimony to contradict a witness, up on a matter wholly collateral to the main issue, and the court may, in their discretion reject such collateral testimony altogether; so too, the court may in their discretion, allow a departure from the general rule, as is sometimes done in important criminal cases. 12 Vt. 535. *Powers et al. v. Leach*, 270.
15. And where the witness was contradicted in a matter collateral to the main issue, and the court, after admitting the evidence, submitted it to the jury whether, upon the whole, they believed the main fact testified to by the witness, it was held, that there was no error. *Id.*
16. The parties being made witnesses in this state, are witnesses to every point material to the determination of the case. *McDaniels v. Robinson*, 316.
17. The interest of a witness, created by a mortgage given to his wife, is removed by an assignment of the mortgage, and the delivery of the assignment will be presumed, if nothing appears in the case showing it otherwise; so too, where the witness holds an assignment of the judgment recovered in a former trial, the objection to his competency is removed by a re-assignment of the same. *Hugh v. Patrick*, 425.
18. Parol testimony is inadmissible for the purpose of contradicting the facts certified and stated by a justice in his record, whether the matter arises collaterally, or upon the writ of *audita querela*, brought to set aside that judgment. *Eastman & Paige v. Waterman*, 494.
19. If one of several plaintiffs be called as a witness by the defendant, and be re-

leased from all interest, and willing to testify, he is a competent witness, although his co-plaintiffs, and others interested on the same side, may object. *Wills & Fairbanks v. Judd*, 617.

20. To remove the interest of a witness who is interested in the event of the suit, he must not only be released from all liability for costs, but also from all liability for the money recovered, and from the claim, in discharge of which, any part of the money recovered in the suit would go. *Id.*

See ASSIGNMENT 1; BOOK ACCOUNT 2; CONVEYANCE 2, 3; DEPOSITIONS; EJECTMENT 4; PARTNERSHIP 5, 6, 7; PROMISSORY NOTES AND BILLS OF EXCHANGE 12, 13.

EXECUTION.

1. If an execution irregularly issues, and a party desires to have the same set aside, he must apply in a reasonable time, which is the earliest convenient time. *Hagood v. Goldard*, 491.
2. Courts of law, ordinarily refuse to set aside executions, when that and that only has been done, which is required to be done now, although done prematurely. *Id.*

See LEVY; AUDITA QUERELA 2, 3.

FALSE IMPRISONMENT. See TAXES 6.

FORCIBLE ENTRY AND DETAINER.

1. This action, under the statute, is given not only against the lessee, who holds over after the lease is determined, but also against any person, holding under the lessee; and any person, who is entitled to the possession of the land, can sustain the action. *Barton v. Learned*, 192.
2. And where the defendant, in 1861, conveyed certain premises to B., and became a tenant to B., at will or sufferance, by a parol agreement, and was to surrender possession, when requested, either to B. or his grantee, and B. deeded to P., and P. deeded to the plaintiff, and all three requested the defendant, within the year, to surrender the premises to the plaintiff, which the defendant refused to do; it was held, that the plaintiff could maintain this action against the defendant for the possession of the premises. *Id.*
3. It was also held, that after notice to surrender the premises, the defendant's right as lessee was determined, and that the defendant was estopped from setting up an adverse right to B. or his grantee. *Id.*
4. In New York, under a similar statute, it was held, that the purchaser of the premises from the landlord might have this remedy. *Birdsell v. Phillips*, 17 Wend. 473. *Id.*

See JUSTICE OF THE PEACE 3.

FORECLOSURE. See CHANCERY 7, 8.

FOREIGN LAWS.

The laws of a foreign country must be stated in the plea and proved as facts.
Peck v. Hubbard, 632.

See PROMISSORY NOTES AND BILLS OF EXCHANGE 16, 17.

FOREIGN COURTS. *See* PROMISSORY NOTES AND BILLS OF EXCHANGE 17.

FRAUDS, STATUTE OF.

The plaintiff sold to the defendant his interest in a certain farm; there was no writing of any kind between the parties, but the defendant agreed "to step into plaintiff's shoes" and to clear him from certain mortgage notes held by one D., and also a \$50 note given by plaintiff with surety to the said D. which had been indorsed on the mortgage notes as part payment; this sale was made in the spring of 1848, since which time defendant had been in possession of the farm; in March 1852, plaintiff paid one half the amount of the \$50 note and costs, &c. for which he seeks to recover in this action; it also appeared, that the plaintiff, and one H. who had owned jointly with plaintiff, had, with the assent of defendant quit-claimed to said D., but that D. only claimed to the extent of his mortgage; the quit-claim to D. was before the sale by plaintiff to the defendant—*Held*—1. That plaintiff to recover for money paid to defendant's use, must show that the debt which he paid had become the proper debt of the defendant to pay, by a contract which was so authenticated, as to form the proper basis of an action in a court of law. 2. That the case came clearly within the provisions of the statute, (Comp. Stat. Chap. 64 § 1,) which provides, that "No action, shall be brought upon any contract for the sale of lands—or of any interest in or concerning them—unless in writing," &c. *Davis v. Farr*, 592.

FRAUD. *See* CHANCERY 5.

FRAUDULENT CONVEYANCE. *See* CONVEYANCE.

GUARANTY.

1. Where the defendant sold and transferred to the plaintiff a promissory note made in the usual form, and placed upon the back of the note the following guaranty, "I hereby guarantee this note good until January 1, 1850,"—*Held*—that the contract of the defendant was collateral, and not absolute, and that by this guaranty he agreed, that during the period mentioned in the guaranty, the makers of the note should be in that condition, that payment of the note could be enforced against them, if legal diligence was used for that purpose. *Hammond v. Chamberlin*, 408.
2. And on such a guarantee the defendant is not liable as indorser, nor is he liable on an absolute engagement to pay the note on the first day of January, 1850, if the makers fail to pay it; and the written guaranty is not admissible as evidence under a count against the defendant as indorser, nor under one on absolute engagement to pay the note on the first day of January, 1850. *Id.*
3. The evidence showed, that the makers of the note before and on the first day of January, 1850, were not only the owners, but were in the open and visible possession of property more than sufficient to pay the note; under this proof it

was held, that there was no breach of the guaranty, and that the note was good within the meaning and terms of the guaranty. *Id.*

4. In this case, the plaintiff commenced an action against the makers of the note, and the sheriff, who served the writ, attached property and took a receipt from the makers of the note and one other, and in consequence of his liability, growing out of the insolvency and failure of his receptors, he paid the debt to the plaintiff—*Held*—that in such a case, the sheriff is not entitled by subrogation to the right and remedy of the plaintiff against the defendant on the guaranty, as this right of subrogation exists only against the makers of the note. *Id.*
5. The payment, by the sheriff, in such a case, will inure to the benefit of the guarantor. *Id.*

GUARDIAN. *See* INFANCY.

GUEST. *See* INNKEEPER.

HIGHWAYS.

1. In apportioning the expense of making a turnpike, under the provisions of the statute a free road, where the same is in several towns, it is the value of the franchise lying in the several towns, which should be the governing rule in the apportionment. *Taylor et al. v. Bullard et al.*, 312.
2. In a petition for a re-appraisal of land damages for laying out highways, any number of land owners, though holding by independent titles, may join in the same petition. *Rand et al. v. Townsend*, 670.
3. The owner of the land, at the time the road is laid, is the person and the only person, to petition for a re-appraisal of damages. *Id.*
4. Where the judgment of the county court in such proceedings is erroneous, the writ of *mandamus* under our practice is the most appropriate proceeding. *Id.*

HUSBAND AND WIFE. *See* MARRIED WOMAN'S ACT; MARRIAGE SETTLEMENT; CHANCERY 1, 2, 3, 4.

INDICTMENT.

1. In an indictment, every traversable fact must be distinctly alleged, with time and place. *State v. La Bore*, 765.
2. In an indictment for bigamy where the time and place of the first marriage was left blank, on demurrer the indictment was held insufficient. *Id.*

INFERENCE. *See* AUDITOR 4.

INFANCY.

1. It is error for an infant defendant to appear and defend by attorney, and if he so appears, and judgment is rendered against him, he may reverse the same, by writ of error. *Somers et al. v. Rogers*, 585.
2. And if several defendants, one being an infant, appear by attorney, it is error,

and on error brought, all should join, and the whole judgment will be reversed, both as to the adults and the infant. *Id.*

See PARENT AND CHILD 1, 2.

INNKEEPERS.

1. The relation of guest is created by a person's putting his horse at an inn, and it will be extended to all his goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time. *McDermott v. Robinson*, 316.
2. Therefore, it is not necessary that the traveler should take all his meals at the inn, or lodge there every night, in order to create the relation, or constitute himself a guest. *Id.*
3. And though the property or money of the guest may be lost by a burglarious entry of the innkeeper's house, under such circumstances as to excuse him from all negligence, and also from liability to his guest, still he cannot be exonerated from the loss of the goods upon presumption merely, or without proof of some of the circumstances ordinarily attending the breaking of a house securely fastened. *Id.*
4. The delivery and acceptance of the goods are a sufficient consideration for any undertaking in regard to them, even when the service is gratuitous. *Id.*
5. In the present case, the plaintiff delivered a sum of money to the defendant to keep, and after he had so delivered the money, and defendant had accepted it, the plaintiff requested defendant to take the money to one Dr. Swift, to keep over night, and the defendant agreed so to do; it was held that this new contract was not inconsistent with the continuance of the former one, and only provided a new mode of discharging the former one, and that it produced no effect upon it unless or until performed. *Id.*
6. What constitutes the relation of guest, and also the extent of tavernkeepers' responsibility for goods stolen or lost, considered and discussed. *Id.*

INTEREST.

1. The Vt. Central Railroad Co. took land in Burlington, under their charter to which there were conflicting claims, and, upon petition to the chancellor, under the provisions of the statute of 1846, [Comp. Stat. 196,] were ordered to deposit in the Farmers and Mechanics' Bank the amount of land damages, as appraised by the commissioners, subject to the future order of the chancellor; and, upon petition subsequently preferred by Haswell, the plaintiff, who claimed to be entitled to the money so deposited, the chancellor, upon notice given to the company in July, 1850, ordered the money so deposited to be paid to said Haswell, the plaintiff; from this order the said company appealed, and said appeal was duly entered upon the calendar of this court, and at the May term, 1851, it was held, that said company could not appeal from the order of the chancellor, and the case was dismissed from the docket. The present suit was brought to recover interest, on the money so deposited, of the defendants; under the foregoing facts, it was held, that the defendants were mere depositaries and not chargeable with interest on the money, and that on general principles, this suit cannot be sustained. *Haswell v. Farmers and Mechanics' Bank*, 100.

2. It was also *held*, that though the order and decree of the chancellor was not probably vacated by the appeal of said company, as it was improperly allowed, and was properly dismissed by the Supreme Court; still it affords a reasonable excuse for the defendants in not paying over the money, even if demanded, during the pendency of the appeal, as no decree had been made by the chancellor, which he himself treated as a final order in the case. *Id.*

See CHANCERY 14; PRINCIPAL AND AGENT 4; TAXES 5, 8; TRUSTEE PROCESS 4, 5, 6.

JUDGMENTS.

1. Claims allowed by commissioners on the estates of deceased persons, are treated as judgments, except that they cannot be enforced by the final process of execution. *Riz, Admr. v. Nevins*, 884.
2. Judgments recovered in different courts, which are mutual in their character, may on motion, be set off, one against the other; but the judgments not being in the same courts, the set off cannot be directed under the provisions of the statute, but the power to make the set off is derived from the equitable powers of the court, which the court exercises independently of the statute, and from the general jurisdiction of the court over the suitors in it; the application therefore must be addressed to the discretion of the court. *Id.*

JURISDICTION.

Where the claim presented by the plaintiff exceeds \$100, it must be regarded as his book, within the meaning of the statute; and the fact that he fails to prove the claim fully before the auditor, or that it was not upon plaintiff's book, will not effect the question of jurisdiction, unless it appears that a portion of the claim was merely fictitious. *Mason v. Potter*, 722.

See ARBITRATION 17; BOOK ACCOUNT 1; JUSTICE OF THE PEACE 1, 2, 3; PROMISSORY NOTES AND BILLS OF EXCHANGE 6.

JUSTICES OF THE PEACE.

1. In actions on Book Account, the plaintiff's book, and the *débit* side of that book, afford the *only rule* by which the jurisdiction of the justice is to be determined. *Beach v. Beynon*, 105.
2. The jurisdiction of a justice in the action on Book Account, is not affected by the defendant's book, or by any entries therein, which he may make to the credit of the plaintiff. *Id.*
3. In an action under the statute, for *forcible entry* and detainer, giving summary process to get possession of land, since the statute of 1850, (Comp. Stat. 307 and 308,) a single magistrate has jurisdiction. *Barton v. Learned*, 192.
4. Justices of the Peace have jurisdiction in actions for trespass on the freehold where the matter in demand does not exceed twenty dollars, and have authority to decide upon questions of title, whenever, in this action, the question arises; and the security of parties, in relation to the title of their land, is found in their right of appeal. *Small v. Haskins et al.*, 209.

5. A justice of the peace has no jurisdiction in an action of account, between tenants in common of land; as the defendant may plead in bar, that he was never bailiff and receiver of the plaintiff, and thus put the plaintiff upon the proof of his whole declaration, which would bring in question the title to the land. *Thayer v. Montgomery*, 491.
6. Where the title of land is concerned in the action, and the justice has no jurisdiction, the defect may be taken advantage of at any time, during the pendency of the action. *Id.*
7. The entry of a continuance being in the hand writing of the plaintiff's attorney, furnishes no ground of objection, if the justice granted the continuance, and adopted and assented to the entry, by placing his official signature to the same. *Eastman & Paige v. Waterman*, 494.

Ses PROMISSORY NOTES AND BILLS OF EXCHANGE 6.

LANDLORD AND TENANT.

1. If the landlord lease the stock, with the farm, to a tenant, upon shares, and there is an actual or implied contract between them, that the yearlings raised from the cows upon the farm, shall be kept upon the farm until the expiration of the term of the lease; by this contract, the tenant's title to one-half of the yearlings, as an independent and absolute tenant in common, will not become perfected until he has fulfilled his contract; and any attempt, on the part of the tenant to dispose of them, before he has fulfilled his contract, will be such a wrong, as will determine the tenancy as to the yearlings. *Briggs v. Oaks et al.*, 188.
2. And the landlord, under such a contract, may be regarded as the general owner of the stock, and as having the paramount title, and the tenant as owning one-half conditionally, that is, when the term expires, if he performs his contract; and if the tenant, without the consent of the landlord, disposes of the yearlings before the term has expired, and before he has fulfilled his contract, the landlord may maintain replevin for the yearlings, both in the *cepit* and *detinet*. *Id.*
3. And where the contract provides that the property shall remain on the farm until the expiration of the term of the lease, and then be divided, the tenant has no absolute vested right in the property until the expiration of the lease. *Id.*
4. If a tenant by departing from his contract, and putting the property to a different use, is guilty of such an abuse as forfeits his estate, and revives the right of the landlord or general owner to immediate possession; this will enable the landlord or general owner to maintain trespass for any interference with the property by a stranger, after the tenancy is so determined. *Id.*
5. Where one rents a farm, and by the terms of the contract the landlord stocks the same, and the tenant is to have one half the growth of the cattle and one half of the wool produced from the sheep, it was held, that while the tenancy is still subsisting and a portion of the time of the lease unexpired, the tenant cannot be regarded as having acquired any such perfected interest in the property, as will be liable to be levied upon and sold, by his creditors. *Smith v. Niles*, 20 Vt. 815. *Smith v. Meech*, 233.

6. In contracts of this kind, the right of the tenant does not become perfected, until his part of the contract is performed. *Ib.*

See CHANCERY 18; FORCEIBLE ENTRY AND DETAINER; POSSESSION 2, 3.

LEGISLATIVE ENACTMENTS.

The legislature may, by general laws, impose upon railroads new conditions, not contained in their charter, which are conducive to public interests. *Nelson v. N. & Canada R. R. Co.*, 717.

LICENSE. See TRESPASS 3, 4, 6.

LIEN. See ATTACHMENT 1, 2; AUDITOR 1, 2, 3; ESTOPPEL 3, 4.

LEVY.

1. Where a levy was made upon the equity of redemption, and the mortgage described two certain parcels of land, and also a third parcel which was a leasehold estate, the lease being a perpetual lease, reserving an annual rent, and the levy was made upon the equity of redemption in the two first mentioned parcels of land, without regard to the leasehold estate, thus treating the mortgage as containing only the two first mentioned parcels of land, it was *held*, that the levy was properly made. *Hulett v. Souillard*, 295.
2. And it was also *held*, that as the leasehold estate was described in the mortgage by metes and bounds, that it would be only an assignment of the rents, and that as a mortgage in this state does not confer a power of sale, the mortgagee could only receive the annual rent, and might enforce his debt upon the other pieces of land. *Ib.*
3. When an execution is levied upon real estate, of which the debtor has no title, and the records of the court furnish evidence on their face, that the execution was satisfied by such levy, no proceedings can be had to obtain actual payment of that debt, until the evidence of that apparent satisfaction is removed. *Tucker et al. v. Taylor*, 444.
4. The law upon this subject is settled in *Pratt v. Jones*, 22 Vt. 341, and *Baxter v. Tucker*, 1 D. Chip. 353. *Ib.*
5. When a levy has been made on premises where the debtor had no title or interest, the creditor may make application to the court to vacate the levy, and this application is addressed to the power of the court to correct its own records, and this power may be lawfully exercised by the court, on petition or motion, accompanied with affidavits and notice. *Ib.*
6. And in such a case, if the court had jurisdiction over the subject matter, and the parties in the original suit, they will have power to correct their records, or to grant this summary relief, though the parties should remove from the state after the commencement of the suit, and continue to reside without the state. *Ib.*
7. And where such a levy had been made on an execution issued on a judgment, rendered in 1828, on land where the debtor had no title or interest, and the same was suffered to remain in that situation from that time until the present appli-

cation on petition to vacate the levy was made, though the parties during all that period, had the same means for enforcing the claim they now have; under these circumstances, *it was held*, that the application to vacate the levy, ought not to be granted, inasmuch as the law will raise a presumption of payment and satisfaction of the judgment, and inasmuch as no circumstances appear in the petition affecting that presumption, and the court dismissed the petition. *Id.*

See SURETY 2.

LIQUOR LAW.

The Maine Liquor Law of Vermont was passed to go into effect on the second Tuesday of March, 1858, with a proviso, that a vote should be taken in relation to the time when the act should go into operation, and if a majority of the votes cast should be "no," then the act should go into operation in December, 1858—*Held*, constitutional. *State v. Parker*, 357.

MARRIAGE SETTLEMENT.

A marriage settlement incomplete by reason of a want of trustees, is only an agreement to make a settlement, and will not, at law, exempt the annual crops, of the wife's land from an execution against the husband. *Bruce et ux. v. Thompson*, 741.

MARRIED WOMAN'S ACT, (COMP. STAT. CHAP. 58 § 15.)

By the language of the married woman's act, (Comp. Stat. Chap. 58 § 15,) the annual product of the wife's land is not exempted from the husband's control or from his creditors. *Bruce et ux. v. Thompson*, 741.

MASTER AND SERVANT. *See TRESPASS 5.*

MANDAMUS. *See HIGHWAYS 4; PRACTICE 2.*

MERGER. *See BOOK ACCOUNT 3; MORTGAGE 4.*

MILLS. *See WATER, RIGHTS TO.*

MORTGAGE.

1. The mortgagor is regarded in this State, after the law day, as a *quasi* tenant to his mortgagee, and if he execute two or more successive mortgages to different persons, he is as much estopped to deny the title of the subordinate mortgagees, as of the first; and his deed estops him from setting up an outstanding title in a stranger, or of defending himself by means of that title, until he has first *done fide* surrendered the possession. *Wires & Peck v. Nelson et al.*, 13.
2. It is the duty of the mortgagor to surrender to either mortgagee, on notice, and if he do not, he thereby becomes a wrong doer, and liable to pay rents and profits to some one of the mortgagees. *Id.*
3. The allowance of demands secured by mortgage, as claims against the estate of the mortgagor, will have no effect to defeat or impair that security, or prevent their being taken into account, in the allowance of such dividends against the

estate, as may be ordered by the probate court; for until the claims are fully paid by the mortgagor, or some person having his interest, they stand in the same situation, as other claims allowed against the estate, for which no security by mortgage was ever obtained. *Walker, Smith & Co. v. Baxter et al.*, 710.

4. Nor will the purchase of the equity of redemption, by the mortgagee, at a public sale by the administrator of the estate of the mortgagor, merge the different estates of the mortgagor and mortgagee so as to operate as payment or satisfaction of the debts for which the mortgage was given, and this rule will obtain both at law and in equity. *Id.*

See EJECTMENT 5: CHANCERY.

MORTGAGOR AND MORTGAGEE. *See EJECTMENT 1, 2; MORTGAGE 1, 2.*

NEGLIGENCE.

Where the defendant complained of negligence on the part of the plaintiffs, who were attorneys, in the management of a suit, in which he had employed them, it was held, that negligence should have been distinctly found by the auditor, to deprive the plaintiffs of all recovery for services in the suit. *Maynard & Edmunds v. Briggs*, 94.

NEW PROMISE. *See CONDITION PRECEDENT 1; STATUTE OF LIMITATIONS 1, 2.*

NEW TRIAL. *See CHANCERY 9.*

NOTICE.

1. The record of the justice is conclusive on the question of notice, to the defendant. *Eastman & Paige v. Waterman*, 494.
2. When notice of the suit upon the defendant, is found and certified by the justice, he has no right to require or take a recognizance of the plaintiff for review. *Id.*
3. Notice of a discontinuance of a suit need not be in writing, unless for the purpose of saving costs. *Ballou v. Ballou et al.*, 673.

NUISANCE.

A large and furious dog, accustomed to bite mankind, is a common nuisance. In an action to recover damages against a party killing him, the defendant need not prove that he was obliged to kill him in self-defense. *Brown v. Carpenter*, 688.

OFFICER.

A public officer is entitled to reasonable intendments in his favor, the same as are applied to the proceedings of courts. *Stevens v. Kent*, 503.

See ATTACHMENT.

OFFICER'S RETURNS. *See AUDITA QUERRELA 4, 5.*

 OFFSET.

When the plaintiff as administrator of the estate of R., commenced a suit upon certain notes, which R. in his life-time had taken of the defendant, as administrator of the estate of L., (of which estate the plaintiff was also administrator, *de bonis non*,) and obtained judgment against the defendant on the same; and the defendant filed his motion to be allowed, in offset to said judgment, a judgment of commissioners on the estate of said R., in his favor—*Held*—that the plaintiff having thus treated the claim against defendant as assets, and as the property of the estate of R., the same is subjected to every legal and equitable offset, which the defendant has against R. or his estate, and the judgments having thus been rendered mutual in their character, by the acts of the parties, the offset was allowed. *Rix, Admr. v. Novins*, 884.

See JUDGMENT 2.

ORDER OF REMOVAL. *See* POOR 1, 2, 3.

PARENT AND CHILD.

1. Where the father had given his minor son leave to act for himself, and had made publication of the fact, and that he would not thereafter pay any debts of the son, and the son returned to his father's house sick, and the plaintiff's charges were for necessary medical services rendered the son, upon the credit of the father, and in good faith charged to him at the time, and the father knew of the services being rendered and did not object, it was *held*, that the law implies a promise to pay, though the father did not assent to the services being done on his credit, either expressly or impliedly, in fact. *Swain v. Tyler*, 9.
2. And it was *held*, that this rested on the general ground, that while one's minor children remain a part of the father's family and household, and receive necessities, with the knowledge of the father, and without objection, on his part, it is the same thing, as if he received them himself, or his wife received them. *Id.*

PARTIES.

1. Suits may always be brought, either in the name of the parties with whom the contract is made, or in the name of those legally interested, at the election of the plaintiff, when the defendant will not be embarrassed, or in any way injured by such election of the plaintiff. *Meynard & Edmunds v. Briggs*, 94.
2. A party of record cannot be treated as a nominal party merely, if he has any interest in the amount recovered, even though that interest may be in the surplus, after paying specific debts, for which he has made an assignment. *Loonis & Jackson v. Loonis*, 198.
3. When subsequent attaching creditors are permitted to enter and defend in a suit, before a justice of the peace, under the statute, they so far became parties to the suit, that they have the right of appeal, and can prosecute the same in the appellate court. *Chaffee v. Malarkee et al.*, 342.
4. A person who has but an equitable interest, cannot generally sue at law, particularly in real actions which are founded upon title; but where one has an equitable interest and is in actual possession and occupancy of the premises, he

may sustain a personal action for injuries done to that possession, against a wrong doer, or one who has not a better legal title or right of possession. *Hough v. Patrick*, 485.

See PENAL STATUTES 1, 2.

PARTNERSHIP.

1. Where M. was retained, as counsel in certain suits, by the defendant, before M. formed a partnership with E., and the services were performed by M. & E. after the partnership, and this was well known to the defendant, it was held that M. & E. could recover for the services thus rendered, in a joint action against the defendant. *Magnard & Edmunds v. Briggs*, 84.
2. Instruments under seal may be executed for many purposes by one partner, which will be binding on the firm. *McDonald & Mills v. Eggleston, Barker, & Co.*, 154.
3. But instruments executed in that manner, in the absence of other partners, will be binding on the firm only in transactions that transfer an interest. *Id.*
4. A mere partnership relation will not authorize one partner to execute an instrument under seal, whereby a new and original obligation is created, which will be binding on the partnership, as a specialty debt, or which can be enforced by the action of covenant. *Id.*
5. But an instrument of this character, and executed in this manner, may be rendered obligatory by a previous parol authority, or by a subsequent parol ratification, and would in either event become the deed of the company; and much slighter acts will produce that effect, where the subject matter of the agreement is within their partnership dealings, than where it has no connection with the business of the firm. *Id.*
6. And parol testimony is admissible to prove, that the instrument is the deed of the firm, and become such by the signature of one partner, in the name of the firm, by showing a previous authority for that purpose resting in parol, or that they were present at the time or subsequently ratified the same either expressly or impliedly, and this implication may be drawn from the conduct of the partners, or the course of dealing by the firm. *Id.*
7. And where the evidence, though resting in parol, tends to prove this in whole or part, it should go to the jury, as tending to prove the execution of the instrument. *Id.*
8. That the concerns of a partnership are not in a state to be finally settled, does not preclude the partners from making a partial settlement by arbitration. *Kendrick v. Turbell*, 416.
9. The defendant contracted with the plaintiff, to furnish wool for hat bodies, and to peddle or sell the same, and charge nothing for his time or expenses in so doing; the plaintiff was to manufacture the wool into hat bodies, and charge nothing for his time while engaged in the manufacture; and each were to pay one half the expense of extra work, wool, and wear of the machinery, and the defendant after selling the hat bodies was to retain enough out of the proceeds to pay the cost of the wool, and the profits, after deducting the cost of the

the wool, were to be divided between them; *it was held*, that this did not create a partnership between the parties. *Tobias v. Blin*, 21 Vt. 544. *Mason v. Potter*, 722.

10. In general, it is well settled, that no action of assumpsit can be sustained by one partner against his co-partner, in respect to any matter connected with the partnership transactions. *Collamer v. Foster*, 754.

11. But if the parties, by an express agreement, separate a distinct matter from the partnership dealing, and one party expressly agrees to pay the other, a specific sum for that matter, at a given time, the action of assumpsit will lie on that contract, though the matter arose from their partnership dealing. *Id.*

12. So where the defendant agreed to pay the plaintiff a given sum per ton for a quantity of starch, and the costs of transportation to the place where the plaintiff was to deliver the same by the contract, the payment to be made by a given day, *it was held* to be an express contract, on which the plaintiff can sustain the action of assumpsit. *Id.*

See EVIDENCE 12.

PAYMENT.

When a certain sum of money is offered by a debtor to his creditor, in payment of a certain bill or account, and the debtor leaves that sum of money and a receipt in full for said account, in the hands of a third person, directing him in the presence and hearing of the creditor, to deliver the money to the creditor if he will sign the receipt in full, if not to keep and return the money, and the creditor after the debtor leaves, takes and counts the money, and then refuses to return the money or to sign the receipt, this operates as a full payment or discharge of said bill or account, notwithstanding the creditor declares at the time that he does not accept the money in full payment of the bill. The same doctrine held in *McGlynn v. Billings*, 16 Vt. 329. *Cole v. Champlain Transportation Co.*, 87.

See SALE 2; TOWN ORDERS 2.

PENAL STATUTES.

1. Flour inspectors are not the "persons injured" within the meaning of the act of 1850, by the sale of flour required to be inspected, without procuring the same to be inspected, and they cannot sustain an action on the statute for the penalty of such sale, as inspectors of flour. *Hatch v. Robinson & Co. et al.*, 737.

2. The public at large, the dealers in flour, and not flour inspectors, are intended to be protected by the statute. *Id.*

PETITION. See PRACTICE 2, 3.

PLEADING.

1. In a plea of abatement where new matter is introduced by the plea, containing matters of fact as well as of record, the plea should not conclude with the verification that he is ready to verify, with the writ or record, but with the common verification. *Durand v. Griswold*, 48.

3. If, however, the entire issue is to be proved by the record, the plea should conclude with the verification that "he is ready to verify by the writ or record." *Id.*
3. In a plea in abatement the averments should be direct and positive, so that a traverse will present a proper issue; and where the material and issuable part of the plea was, whether the defendant resided at Charlotta, when the suit was commenced, and the averment was, "that at the time of issuing and service of said writ, the said defendant did reside, and for a long time before, had and ever since has resided, in the town of Burlington and not elsewhere," the averment was held defective on demurrer. *Id.*
4. But the averment as to the residence of the plaintiff, "that at the time aforesaid he did not reside in Charlotte," was held to be well made, and properly to present the issue as to the residence of the plaintiff. *Id.*
5. The plea of *puis darrein continuance*, in its legal effect is a waiver of all previous pleas, and the cause of action on the record, stands admitted to the same extent, as it would have been, if no defense had been urged other than that set up in the plea itself; such a plea, in fact, strikes from the record, by operation of law, all previous pleas, and everything stands confessed, except the special matter contested by the plea. *Lincoln v. Thrall*, 304.
6. And the fact that a plea of the *general issue* was filed with the plea of *puis darrein continuance*, will not effect the rights of the parties. *Id.*
7. The plea of *puis darrein continuance*, in the present case goes to the plaintiff's right of action—*Query*—Whether the rule would have been different, if it had simply effected the plaintiff's remedy. *Id.*
8. If the replication to a plea contain more than one answer, and tenders several and distinct issues, which will necessarily lead to several traverses, the replication is defective on special demurrer. *Downer v. Rowell*, 397.
9. And though a party, in answer to the plea in bankruptcy, is not confined to a technical replication, but may, under the 4th section of the bankrupt act give the defendant written notice, specifying the fraudulent act and concealment; still if the party adopts the form of a special replication, thereby calling for a rejoinder and special traverse, it must be single in its character, or the defect will be reached by a demurrer. *Id.*

See ACCOUNT 1; TRESPASS 3, 4, 6.

PLEA PUIS DARREIN CONTINUANCE. *See* PLEADING 5, 6, 7.

POOR.

1. An order of removal of a pauper, notified to the town to which the order is made within thirty days, according to the statute, conclusively fixes the settlement of the pauper, unless appealed from. *Stowe v. Brookfield*, 524.
2. It is the same as any other judgment, as to its conclusiveness, when the order is regularly made, and notice properly served upon the adversary town. *Id.*
3. An order of removal regularly made, and properly served upon the adversary

town, and unappealed from is conclusive of the settlement of the pauper at its date, and to change the settlement by residence, that which is subsequent, in point of time to the order, can only be taken into the account. *Id.*

POSSESSION.

1. The possession of a portion of a lot of land, claiming the whole, gives color of possession, which in construction of law, is possession itself. *Swift, Admr. v. Gage et al.*, 224.
2. A tenant, who is in possession of land under the landlord, cannot surrender or transfer the possession of the same, without the consent of the landlord, to a third person, so as to defeat the title of his landlord. *Id.*
3. And occasional acts of turning in cattle, and cutting timber, while the landlord and his tenants maintained the exclusive possession of the land, will not defeat the possession of the landlord, as such acts under such circumstances, only amount to trespass. *Id.*
4. Actual possession is a good title against any one, who cannot show a better title. *Hough v. Patrick*, 435.
5. And so where in 1835, the plaintiff went into possession of premises under a bond for a deed, and erected a house, and continued in possession till he finally took a deed of the premises; and the plaintiff's grantor in 1836, gave the defendant parol permission to erect a dam across a stream on the said grantor's land, which defendant erected and thereby injured the land of the plaintiff; in an action to recover damages for such injuries, it was held, that the parol permission to defendant, would create and give him but an equitable interest, which would be held subservient to the prior and superior equity of the plaintiff, and that the defendant had no right to interfere with, or disturb the plaintiff in the occupancy or possession of his premises; and that unless the defendant could establish a legal right to the erection and continuance of the dam, and also the right to flow the premises in plaintiff's possession, the plaintiff would be entitled to recover damages sustained at any time within six years before the commencement of his suit. *Id.*

PRACTICE.

1. When a case has been referred under a general rule of reference, no questions of law are before this court, except such as are saved by the referee. *Spear v. Stacy*, 61.
2. It is not necessary that a petition for a mandamus, requiring a constable and collector to execute a deed of land sold by him for taxes, should allege all the particular facts, upon which the writ is claimed, so that the case may be tried upon demurrer, as is common and requisite, in suits according to the course of the common law; if the petition states the right and duty in general terms it is all that is required. *Kidder v. Morse*, 74.
3. Nor is it necessary for the petitioner, in this stage of the proceedings, to show that all the previous proceedings have been regular, for it is not competent for the collector to allege his own default, as an excuse for not executing the deed, and the petitioner is not obliged to contest these questions with the collector. *Id.*

4. This court will not reverse a judgment of the county court, unless enough appears affirmatively to show that there was error. *Barber v. Britton & Hall*, 112.
5. If it appear that the charge of the court below to the jury under the state of evidence, was all that was important to a correct understanding of the law applicable to the facts, this court will not reverse the judgment, even where there is technical error, if such error had no direct bearing upon the case. *Fletcher v. Cole*, 170.
6. In cases where nothing appears to show upon which count a verdict is taken, and some of the counts are good, and some bad, the presumption is, that the verdict was upon the good count. *Whitcomb v. Wolcott*, 21 Vt. 388. *McDuffie v. Magoon*, 518.
7. Questions arising as to the manner, in which the disclosure of the trustee was obtained, or in which the examination was conducted, as well also as the motion to recommit, are matters resting in the discretion of the county court, and are not revisable on exceptions. *Peck & Co. v. Merrill & Tr.*, 686.

See ARBITRATION 1, 2, 3, 4.

PRESUMPTION.

1. The question of presumption, in favor of the proceedings of an administrator, in the sale of real estate, should be submitted to the jury as an open question for them to determine, according to their view of the facts, and if not so submitted it is error. *Doolittle et al. v. Holton*, 588.
2. As a general rule one presumption is not allowed to be based upon another. *Id.*

PRINCIPAL AND AGENT.

1. If an injury is to result to one man from the omissions or neglect of an agent of another, the principal must be held liable. *Barber v. Britton & Hall*, 112.
2. And where the defendants sent their agent to employ the plaintiff, who was a physician, to visit a boy, who had been injured while in their service, and told the agent to tell plaintiff that they would pay him for his first visit, and the agent neglected so to do, and employed the plaintiff generally to attend the boy, so long as he might need medical aid; and the plaintiff attended upon the boy, on the credit of the defendants, until the boy recovered—*Held*, under these facts, that defendants were liable to the plaintiff for his services in attending upon the boy. *Id.*
3. If a clerk or agent in a store exceeds his general powers, by giving a credit to a customer, and the customer has no notice or knowledge of the fact, at the time, but acts in good faith, the principal will be bound by the act of his agent or clerk. *Linsley v. Lovely*, 123.
4. An agent, who receives money for his principal, in the transaction of the business of the principal, is not liable for interest on the money so received, before a demand is made for the money, unless the agent has received special instructions to remit the money as fast as collected, or is in default in neglecting to render his account. *Hauschurst v. Hovey*, 544.

5. The same rule applies to an attorney, who has collected money for his client. *Id.*

See CONTRACT 4, 5.

PROBATE COURT.

1. As the law now stands the Supreme Court have no general jurisdiction, in probate matters, to rehear and determine them, upon their merits. *Holmes v. Estate of Holmes*, 536.
2. Power to revise questions resting in discretion, which have been passed upon by the probate court, by our present statute is conferred upon the county court, which, in this respect, is but a higher court of probate. *Id.*
3. The removal of an administrator, for any cause, within the jurisdiction of the probate court, and which is, by law, a sufficient ground of removal, is, by the statute, and upon general principles, a matter of discretion merely, and as such cannot be revised by this court. *Id.*
4. In probate matters the Supreme Court sit merely as a court of error, the same as in cases at common law. *Id.*
5. Where D. by his will made his wife executrix, and also named her trustee of certain property, consisting of notes, and she administered in part upon D's estate, and was appointed trustee by the probate court and gave bonds; and soon after she deceased, and S. & P. were appointed administrators of her estate; and the plaintiff was appointed administrator *de bonis non* of the estate of D.; the notes having become due, being in the hands of S. & P. who claimed to hold them as administrators; and the plaintiff claiming to have and collect them, as administrator *de bonis non* of D. and for the purpose of obtaining and collecting the same brought his bill in chancery—*Held*—That the probate court has jurisdiction of the matter, and the accounting cannot be taken out of that court into the court of chancery. *Held* also, that S. & P. have the rightful possession of the securities, and that it is their duty to settle the trustee account of the intestate in the probate court, and to collect and manage the trust fund, until they can settle the account, and that the plaintiff has no legal control over the same. *Merriam, Adm., v. Hemmingsway et al.*, 565.

PROCESS, See ATTACHMENT.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. If a bill of exchange be drawn and accepted at a time when the drawer has an open account with the acceptor, for goods which he is in the course of sending to the acceptor for sale, and it appear to have been the understanding of the parties, at the time, that the bill was to be paid by the acceptor, and its amount be entered in the general account, it will be treated as a bill drawn for value, imposing upon the acceptor the primary obligation to pay it, and cannot be held an accommodation bill; and its legal character, in this respect, will not be affected by any alteration of the balance of the account, nor by the fact, afterwards ascertained, that the drawer was indebted to the acceptor at the time of the acceptance. *Farmers & Mechanics' Bank v. Rathbone*, 19.

2. The release of the drawer, in such case, by the holder, will not discharge the acceptor, but will be treated as a relinquishment, merely, by the holder, of so much security, which he had for the payment of the debt. *Id.*
3. An indorsee, for value, of a bill of exchange, who became such before its maturity, and in ignorance that it was given for accommodation, has a right to treat all parties thereon, as liable to him according to their relative positions on the bill, and to regard the acceptor as the principal debtor, and the liability of the drawer as collateral; and this right is unaffected by any subsequently acquired knowledge, that the bill was given for accommodation. In such case a release of the drawer, by the holder, has no effect on the ultimate liability of the acceptor. *Id.*
4. And in this respect the rule is the same in equity as at law. *Id.*
5. A premium note to an Insurance Company, in these words, "For value received, in policy No. —, dated the 8th day of January, 1849, issued by the Washington County Mutual Insurance Co., I promise to pay said Company the sum of twenty-one dollars, in such portions and at such time or times as the directors of said Company may, agreeably to their act of incorporation, require," was held to be a promissory note payable by instalments, at the election of the payee, and that it must be regarded as a note for the full amount specified, as much as if it were payable absolutely in instalments. *Washington Co. Mut. Ins. Co. v. Miller et al.*, 77.
6. The final jurisdiction of a justice on such a note must be determined [by the amount of the note, without reference to the amount due by the assessment. *Id.*
7. If the payee of a promissory note indorses and delivers the same to the indorsee as collateral security for money advanced, the indorsement is irrevocable, and it vests the title to the note in the indorsee, and also the right to recover the whole amount due on the note against the maker. *Tarbell v. Shurtceoff*, 513.
8. And in such case, the indorsee would hold the surplus, after payment of his claim, as trustee of the payee of the note, or of his assignee. *Id.*
9. In a suit brought by the indorsee of the note against the maker, testimony tending to prove, that the payee of the note has assigned his interest in the note, and that the indorsee holds the note as collateral security, and that the assignee has tendered to the indorsee the amount due to him from the payee, is inadmissible, and constitutes no defense for the maker of the note, as he must pay to the person legally entitled to receive it, and to the one the payee has ordered the contents of the note to be paid to. *Id.*
10. In a suit by the indorsee against the maker of a promissory note, controverted matters, between the indorsee and payee, or one having his interest, cannot be properly determined, if the maker is a stranger to the transaction, and it in no way affects his liability on the note. *Id.*
11. A condition to a promissory note, that if the amount of the note is not legally due, upon certain other notes, which are named in the condition, upon which payments had been made, this note is not to be paid, otherwise it is to be paid, is in the nature of a defeasance or condition subsequent, and is for the benefit of the makers, and the burden of proof will lie upon those, for whose benefit the condition was annexed. *McDuffie v. Magoon et al.*, 513.

12. It is not admissible to show by *parol evidence* that the notes named in the condition, were by mistake originally made too large; nor is it competent to show by *parol evidence*, that the contract was different from that expressed in the note. *Ib.*
13. But if the mistake is apparent on the face of the contract, when taken in connection with the note, it will be a defense to that extent. *Ib.*
14. The indorsee of a bill of exchange as collateral security for a pre-existing debt is *prima facie*, a holder for value, and so entitled to recover against an accommodation acceptor, not known to him to be such when the bill was taken by him. *Atkinson v. Brooks*, 569.
15. A promissory note, made and executed in the province of Canada and payable generally, that is, no specified place of payment being mentioned in the note, is to be treated as a note of that place, and the rights, duties, and obligations, growing out of it, are to be determined by the laws of that province. *Peck v. Hibbard*, 698.
16. And if the maker of the note is regularly discharged as a bankrupt, under the laws of that province, so that such discharge in bankruptcy pleaded in bar, would be a good defense to the note, in that province, then also will that discharge be equally a bar to a suit on the note in this state; and it is immaterial whether the maker was domiciled in this state, or in that province, at the time of the discharge; for whatever will be a good defense by the laws of that province, where the note was given and payable, will be a good defense, wherever and by whomsoever the note may be prosecuted. *Ib.*
17. The note in suit, was indorsed to the plaintiff after the proceedings in bankruptcy had been commenced in Canada, and after the note had been presented and allowed under those proceedings: this would place the claim within the jurisdiction of the court in that province; and it is not competent for a party to defeat the operation of those laws, by a subsequent indorsement of the note to a citizen of another country; and the plaintiff, as indorsee, took the note, subject to every defense existing against his immediate indorsers; and the discharge in bankruptcy pleaded in bar was held to be equally a defense to this suit, whether we apply the rule applicable to a foreign discharge in bankruptcy, or the rule applicable to a discharge under state insolvent laws. *Ib.*

PRUDENTIAL COMMITTEE. *See* SCHOOL TEACHERS 3; SCHOOL DISTRICTS 2.

QUANTUM MERUIT. *See* CONTRACT.

QUI TAM ACTION. *See* PENAL STATUTES.

RAILROAD COMPANIES.

1. The company owning a railroad will be liable for the acts of their lessees who run the road. *Nelson v. Vl. & Canada R. R. Co.*, 717.
2. Where a town had a remedy against a railroad corporation for damages paid for a defect in a road built by the corporation, in lieu of an old road taken by them for the track of the railroad, it was held, that the town might also recover of the corporation the costs and expenses incurred in defending the suit against them for such damages, the corporation having been notified of the suit and having declined interfering. *Dunbury v. Vl. Cent. R. R. Co.*, 751.

3. *See* **SEMBLE**, per REDFIELD, Ch. J.—The only question is, whether the town were justified in making the defense, and it is immaterial whether the defense is put upon grounds peculiar to the town. *Id.*

See **COMMON CARRIERS** 1, 2, 3, 4, 5, 6.

RECORD. *See* **CONVEYANCE**; **EVIDENCE** 18; **NOTICE** 1, 2.

RECOGNIZANCE. *See* **BASTARDY** 5, 6.

REFERENCE. *See* **ARBITRATION**.

REFEREE. *See* **BOND** 1; **PRACTICE** 1.

REPLEVIN. *See* **LANDLORD AND TENANT** 2.

RESERVATION. *See* **WATER, RIGHTS TO**.

RETRAXIT. *See* **APPEAL** 1.

REVIEW. *See* **BETTERMENTS**.

RIGHTS OF MARRIED WOMEN. *See* **CHANCERY** 1, 2, 3, 4.

RIPARIAN PROPRIETORS.

The accumulation of a sand-bar in a stream, is ordinarily one of those natural results, which neither party has any right to interfere with, by direct removal. But probably, where its accumulation is a common injury to both parties, either would be justified in removing the sand-bar. *Rood et al v. Johnson*, 64.

SALE.

1. Where B. had leased a farm to T., and by an agreement between them, B. was to have a lien upon the products of the farm, for advances made and to be made, and among the products of said farm there was a quantity of cheese, which they carried to a depot, and left it with the agent, to be sent to a certain house in New York, with the understanding that B., who owned one-half by the terms of the lease, and had a lien upon the other half of the cheese by their agreement, should receive the money for all the cheese, when sold, and account to T. for his part of the same on general settlement, and after they had so left the cheese, and on the same day, T. sold his interest in the same to S., without the knowledge of B., and with the intention, on the part of T. and S., to embarrass or defeat B., in enforcing his lien, and securing his account against T.; it was held, that this sale from T. to S. was void as to B. *Shepard v. Briggs*, 149.
2. And where T. and S. went to the property which had thus been put into the custody of the carrier by B. and T., and looking at the cheese T. said to S., I deliver this to you, but did not move the property, or notify the agent of the carrier, that any change had been made in the ownership or in the consignors, it was held, that this was no change of possession, and that it could have had no effect upon B., even if the contract had been *bona fide*. *Id.*
3. Where the defendant bought of the plaintiff a yoke of oxen for \$95.00, and gave the plaintiff \$5.00 in money, and a note which the defendant held against N. for \$90.00, payable to the defendant or bearer, in three months from date, which

note the defendant indorsed, and the plaintiff accepted and received the same, and N. having failed to pay the note when it became due, the plaintiff commenced an action on book account, to recover the price of the oxen—*Held*—that the delivery and acceptance of the note and money operated as payment for the oxen, and that no action for the price of the oxen, upon the original claim, could be sustained. *Farr v. Stevens*, 299.

4. The rule would be otherwise, if the note had been received by the plaintiff as payment, under any fraudulent representations, as to the solvency of the maker, or if the note had from some inherent vice, such as illegality of consideration, forgery, and the like, proved unavailable; as in all such cases, the vendor may treat it as a nullity, and sue on the original indebtedness. *Id.*
5. And where the defendants sold conditionally a yoke of oxen to the plaintiff, the oxen to be the property of the defendants, until paid for and by the terms of the trade plaintiff was to pay for the oxen by cutting and drawing a quantity of cord wood, and before plaintiff had drawn all the wood, he permitted the oxen to go into the hands of the defendants on a loan for a few days, and when plaintiff called for the oxen, the defendants refused to re-deliver them, unless the plaintiff would procure additional security for the payment of the price—*Held*—under these circumstances, that the refusal to re-deliver the oxen was a disaffirmance of the contract and an assertion of their right to the cattle, and that the plaintiff was entitled to recover for the wood delivered to defendants, no application having been made of the same. *Martin v. Eames & Bellows*, 476.
6. After such demand and refusal to re-deliver the oxen, an attachment of the oxen as the property of the plaintiff, the vendee, cannot affect the case, as he had then no property or interest in the cattle that could be attached; such an attachment would, therefore, be a violation of the right of the defendants, the vendors. *Id.*
7. The question of change of possession is purely one of law where there is no conflict in the evidence; but where the testimony is conflicting and the facts uncertain, it must be submitted to the jury to find the facts, and the court are to say what facts, if found by the jury, constitute a change of possession. *Burrows v. Stebbins & Kenney*, 659.
8. And where A. sold and conveyed his farm to B. and also sold B. a quantity of cord wood, lying upon the farm in the vicinity of the buildings, and A. left the state; B. piled up the wood and offered it for sale, and it with the farm thus remained in the possession of B. for some months, the change of possession was held sufficient, though the vendor's family remained in the house upon the farm. *Id.*

SCHOOL DISTRICT.

1. It is not necessary that the moderator chosen at the annual school district meeting should preside at all subsequent meetings of the district during the year; the proceedings will be valid if the district should at a subsequent meeting elect a moderator to preside over that meeting. *Stevens v. Kent*, 508.
2. The prudential committee of a school district refusing to do a particular act, in his official duty, in good faith, not believing it to be a duty, will not create a vacancy in the office; but if a new district should be erected and the prudential committee of the old district is included within the limits of such new district, it will create a vacancy in the office. *Id.*

3. The fact that a school district mistook their rights, and the location of their school house proved to be illegal, and upon indictment was adjudged a nuisance, will not effect the validity of the tax raised to build the school house. *Id.*

SCHOOL TEACHERS.

1. The statute requires every teacher to obtain a certificate of his qualifications before he opens his school; and the obtaining of such certificate is a *pre-requisite* to a right of action for his services as a teacher. *Goodrich v. School District No. 1 in Fairfax*, 115.
2. And the facts, that the teacher was a minor, and that the superintendant was sick, and deceased, and no superintendant was appointed to fill the vacancy, till after his school commenced, cannot supersede the statute. *Id.*
3. And the prudential committee have no power to waive the requirements of the statute, nor can the prudential committee bind the district, by a contract with the teacher, that he may teach the school without procuring a certificate of his qualifications. *Id.*

SCIRE FACIAS. *See* BASTARDY 6, 6, 7, 8.

SELECTMEN. *See* ARBITRATION 5.

SETTLEMENT. *See* BASTARDY 4.

SHERIFF.

1. If an officer, in the discharge of his official duty, commits a trespass, and the party does not control the officer in any way, then the party cannot be implicated in the original wrong and the expressing of an opinion, as to the act, under protest that he does not assume to direct or advise the officer, is not such an assent to the act, as to implicate the party. *Hyde v. Cooper*, 552.
2. But where the mistake is one of fact, and such as makes the officer a trespasser, and the party knowing all the facts, consents to take the avails of a sale, or counsels the act, which creates the liability of the officer, (as a general rule,) he is implicated, to the same extent, as the officer. *Id.*
3. When the party does not direct or control the course of the officer, but requires him to proceed, at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser, by relation, the party is not affected by it even when he receives money which is the result of such irregularity, although he was aware of the course pursued by the officer. *Id.*
4. In such a case, to implicate the party, there must be proof that he consented to the course of the officer, or that he subsequently adopted it. *Id.*

See ATTACHMENT; TROVER 1.

SPIRITOUS LIQUORS, SALE OF. *See* CONTRACT 10, 11, 12.

STATUTE OF LIMITATIONS.

1. Where the defendant, speaking of his liabilities, said in relation to the note in question, "that he had signed the same with his son, and that in the end he

thought he should have it to pay," *it was held*, that this was an unqualified acknowledgment that the note was signed by him; that it was still unpaid; and that his liability was then subsisting; and that this acknowledgment took the case out of the statute of limitations. *Phelps v. Williamson*, 230.

2. And the defendant saying at the time, "that enough had been paid to pay the debt, if it had been paid when it should have been;" does not vary the case, or take it out of the rule, which has been recognized by the decisions in this state, on this subject. *Id.*
3. Whether the admissions of a party take a case out of the statute of limitations, is a question of law merely, and where the terms of the admissions are found by the referee, it may as such be always decided by the court. *Hayden v. Johnson*, 768.
4. Where the defendant when called upon for payment said, "I supposed it was paid by White, by an arrangement; tell your father to put White up to pay it,—if he does not, I shall have to pay it,"—*Held*—that this admission, with proof that White had not paid it, would remove the statute bar. *Id.*

STATUTE. *See* CHANCERY 1, 2, 3, 4; TRUSTEE PROCESS 2.

STAKEHOLDER. *See* WAGER.

SUBSEQUENT ATTACHING CREDITORS. *See* AUDITORS 2, 3.

SUBROGATION. *See* CHANCERY 16; GUARANTY 4.

SURETY.

1. If the surety in any way extinguishes or pays the debt of the principal, it is, so far as the principal is concerned, equivalent to paying money for his benefit and at his request, and the surety can maintain general assumpsit for money paid, against the principal. *Hulett v. Soullard*, 295.
2. And if the surety is sued upon the debt of the principal, and it goes into a judgment and is levied upon the lands of the surety, the surety may recover of the principal both the debt and costs, as money paid. *Id.*
3. Where the surety on a note takes a mortgage from the principal debtor, conditioned that he will pay the note, and save the surety harmless, a trust is thereby created, and also an equitable *lien* on the lands for the benefit of the creditor, and the surety as mortgagee, holds the property subject to such trust, and equity will compel him to give the creditor the benefit of such *lien*, for the security and payment of his debt; and if the surety voluntarily assigns the mortgage for this purpose, the effect will be the same, as if the assignment had been made under a decree in chancery. *Paris v. Hulett*, 308.

See CONVEYANCE 3.

TAXES.

1. If a collector of a school district call upon one legally assessed in the district, for the payment of a tax, which he holds against him for collection, and the taxpayer absolutely refuses to pay the tax, after such a refusal the collector is not

required to give further time, and specify the time and place, when and where he will receive the tax, but may if he elects, at once levy on the property of the one so refusing to pay. *Downer v. Woodbury*, 19 Vt. 329. *Whealock v. Archer et al.*, 380.

2. And where the collector justifies under his tax bill and warrant; the fact that plaintiff promised that he would pay the tax that week, if he would leave the property upon which he had levied, can have no effect upon the collector's liability in an action for trespass, as the plaintiff's former refusal would justify the collector in proceeding with his levy until the tax was paid. *Ib.*
3. The proceedings of the collector, subsequent to the levy, will be presumed to be correct, unless from facts existing in the case, they appear to be otherwise; and the fact, that in making an adjournment of the sale, he inserted "4 o'clock, A. M.," instead of "4 o'clock, P. M.," will not render him a trespasser in making the sale. *Ib.*
4. And a person assisting the collector in making a legal levy, will not become a trespasser, by a subsequent abuse by the collector of his authority. *Ib.*
5. The assessment of taxes does not create a debt that can be enforced by suit, or a claim upon which a promise to pay interest can be implied, either before or after a demand has been made for the payment of the tax by the collector. *Show v. Peckett et al.*, 482.
6. If a collector arrest a tax-payer, for the purpose of enforcing the payment of interest merely, the arrest will be illegal, and it makes no difference that the tax-payer neglected and refused for some years, after a demand for the payment of the tax was made, to pay the same, and that during the most of the time he was out of the state, and had no known property in the state. *Ib.*

TAX-PAYER. See TAXES.

TOWN ORDERS.

1. A town order in these words, "The treasurer of the town of Whitingham is directed to pay to W. H. Follett or bearer, ten dollars and eighty-six cents on demand, Jan. 7, 1861," has all the elements of negotiable paper, and when such orders are drawn, presented for payment, and payment refused, they are negotiable, and can be prosecuted in the name of the indorsee. *Dalrymple v. Whitingham*, 846.
2. When a town order is delivered and accepted by a party, it operates as a satisfaction of the amount for which it is given, and the remedy of the party is only upon the order, and no recovery can be had upon that, until after the order has been presented to the treasurer of the town for payment. *Ib.*

TRESPASS.

1. One *tert feisor* may always recover against a subsequent *tert feisor*, who shows no right whatever. *Fletcher v. Cole*, 170.
2. The assignment of the property attached, by the debtor to the creditor, in discharge of his judgment, will not defeat the liability of the officer for the property, and being liable over, he will recover the full amount of one who wrongfully takes the property. *Ib.*

3. An objection, founded upon the want of the proper minute of the time of issuing the writ, to be made by the authority signing the same, as required by the statute, must be made at the first term of the court to which the writ is returnable, and before pleading to the merits, and if not so made it will be out of time. *HE v. Morey*, 178.
4. The plea of not guilty, in an action of trespass, is regarded as waiver of all dilatory defenses. *Id.*
5. Where A., although as a volunteer, undertakes to assist B. in performing a certain piece of work, and is suffered to proceed without objection, B. being at the time present, they will stand in the relation of master and servant; and the acts of A. being done for the benefit of B., if A. while thus engaged, should negligently, or for the want of proper information, commit a trespass, B. will be liable for the same. *Id.*
6. A license cannot be proved under the general issue, in an action of *trespass quare clausum fregit*, in defense to the suit; but to be available it must be pleaded. *Id.*
7. In the action of *trespass quare clausum fregit*, when the title is litigated, and that question adjudicated, and a judgment has been rendered in this form of action, by a court having competent jurisdiction, the judgment will conclude the parties, and operate as an estoppel, if the matter appears on the face of the record; or as evidence conclusive in relation to the title, in any subsequent litigation of that matter between the parties. *Small v. Haskins et al.*, 209.
8. The plaintiff let L. have a quantity of goods for the purpose of peddling, and the goods were to remain his until sold, and he had a right to retake the goods at any time, and L. had the right to return them when he pleased; when the goods were sold, L. was to account for them at prices specified in a list of the articles made out by the plaintiff, for L., and by agreement between the parties, L. deposited with the plaintiff a sum of money, equal in amount to the value of the goods, which sum was to remain, as collateral security, for the performance of the contract on the part of L., in the hands of the plaintiff. After L. had disposed of a portion of the goods so taken, he took more goods of the plaintiff on the same terms, and at the time paid \$39 in money to the plaintiff, which sum was equal in amount, into the sum of \$4.12, to the value of the goods taken at this time, and took a list of the articles, as before, upon which \$39 was credited as so much paid, and also retained the goods unsold, which he received the first time. These goods while in the possession of L., were attached by a creditor of L. as the property of L.; and the plaintiff brought his action of trespass to recover the value of the goods so attached. Upon the foregoing state of facts, it was held, that the plaintiff could maintain the action of trespass, but could only recover the balance unpaid on the second bill of goods after deducting the \$39 and interest. *Chaffee v. Sherman*, 237.

See ATTACHMENT 8; ESTOPPEL 5; POSSESSION 3; LANDLORD AND TENANT 4; SHERIFF.

TROVER.

1. In an action of trover on officer's receipt for property attached, it was held, that the expression, "we being receiptors," in a written admission of a demand and

refusal to deliver the goods in controversy, was evidence only of the fact, that a receipt had been given. *Taylor v. Rhodes et al.*, 57.

2. And it was also held, that the plaintiff's right of action must depend upon the tenor of the receipt. *Ib.*
3. A naked agreement merely, to purchase property for another, no funds being furnished and no general agency existing, vests no title in such other person, and if he takes the property forcibly, he is liable in trover. - *Paige v. Hammond et al.*, 375.

TRUSTEE PROCESS.

1. Where the writ in a trustee process, was served on the principal defendant, a resident of Addison County, by a deputy sheriff of Washington County, who had served said writ on the trustee, a resident of Washington County, this service on the principal defendant, was held defective, under our present statute, (Comp. Stat. 257 § 10,) which provides, "that if the goods or estate of the principal defendant, in his own hands and possession, are attached, the writ shall be served on the principal defendant in the same manner as an ordinary writ of attachment, otherwise it shall be served on him as a writ of summons." *Wires & Peck v. Griswold & Trustees*, 97.
2. The case of *Covey v. Gale*, 18 Vt. 639, can have no application to our present statute, as that case was decided under the act of 1835, which provided that the same officer who served the writ on the trustees, should also leave a copy with the principal debtors. *Ib.*
3. The objections taken to the plea in abatement, that it set forth matter *dehors* the writ, and that it should not have commenced with a prayer of judgment, overruled on the authority of the case of *Gray v. Flowers*, 24 Vt. 538. *Ib.*
4. The judgment creditor cannot recover interest of the trustee for the funds in his hands, if when his suit was commenced, and when the disclosure was filed, the trustee was not chargeable with interest in behalf of the principal debtor. *Lyman et al. v. Orr & Trustees*, 119.
5. And the principal debtor, when the suit was commenced, could not claim interest of the trustee, neither could he, if the trustee process should be dissolved, claim interest up to that time, if there had been no wrongful detention of the money on the part of the trustee; and in this respect the attaching creditor acquires no rights that the principal debtor would not have. *Ib.*
6. The trustee process locks up the funds in the hands of the trustee, and after the service of the writ until the termination of the suit, the funds are in the custody of the law, and it is not necessary for the trustee to protect himself to deposit the funds with the clerk, but he himself is the stake-holder of the funds, for the one or the other, as their rights may be determined. *Ib.*
7. In a trustee process, the case is not ended as to the principal defendant, until the case is disposed of as to the trustee; and strictly speaking the plaintiff would not be entitled to an execution, till the day following the final determination of the whole case. *Hagood v. Goddard*, 401.

TRUST. See SURETY 3.

VERDICT. *See* PRACTICE §.4

WAGER.

1. Money lost upon a wager, does not come within the 12th section of chap. 110, Comp. Stat., as to money being lost at a "game or sport." *West v. Holmes*, 530.
2. But all wagers are held illegal in this state; and the party making the wager, and depositing the money in the hands of a stake-holder, may, by demanding it back, at any time before it is paid over to the winner by his assent, entitle himself to recover the money. *Id.*
3. If the money is paid over to the winner, by the consent, express or implied, of the loser, he cannot recover it back. *Id.*
4. If the stake-holder pays the money over to the winner, after the other party has demanded it of him, the stake-holder will be liable for the same, or the loser may pursue the money into the winner's hands, or into the hands of any other person to whom it comes. *Id.*

WATER, RIGHTS TO.

1. Where the grantor in his deed of a water privilege for a saw-mill, &c., made an exception or reservation of the water, as follows: "except in times of low water, when it is wanted for the carding and cloth dressing, and grist mill," it was held, that the grantees had no right to use the water, when it was wanted for the purposes named in the exception, and that if he used the water, when it was wanted for the carding and cloth dressing, or grist mill, he was liable for the damage occasioned by such use. *Rood et al. v. Johnson*, 64.
2. The grantor may convey the land and reserve all the water to himself, or he may convey the use of all or a portion of the use of the water in the stream, as a mere incorporeal hereditament, and retain the fee of the land, in himself, notwithstanding the maxim that one cannot convey the water separate from the land. *Id.*
3. Reservations of water use in a deed will ordinarily be construed as a reservation of a measure of water, and not for a particular use, and it may therefore be changed or assigned. *Id.*
4. The mill owner having the subordinate right must take notice when he is infringing on the right of his superior, and not reduce the water so low as to interfere with that right, and if he does so reduce it, he is liable for all damage sustained by the owner of the superior right, by being delayed for the water to accumulate. *Id.*
5. And if the owner of the superior right moves his mill further down the stream it would not change the relative rights of the parties, as he would then have the right to take as much water as before he so moved his mill. *Id.*

WATER COURSE. *See* WATER, RIGHTS TO.

WILLS.

1. Where the testator, in his will, in devising a portion of his estate to his wife, made the bequest in the following words; "I give to my beloved wife one-third of all my personal and real estate, and in addition to that, I give her one cow, ten sheep, and one hundred dollars in money, to have at her disposal during her natural life, or so long as she shall remain my widow;" it was held,

I. That the two parts in this item in the testator's will, are distinct and each complete in itself.

II. That the first clause in this item gives to the wife of the testator an estate in fee.

III. That the second clause does not influence or control the first, but the second clause being independent and distinct, it gives to the wife a life estate in the articles specified, in way of addition to the first clause in the bequest, with power of sale. *Hart et al. v. White*, 280.

2. The word *estate*, used in a will in its application to real property, may be used to express either the quantity of interest devised, or to designate the thing devised, or both; and the sense in which it is used must be determined from the will itself. *Id.*

See EVIDENCE 1, 2, 3, 4.

WITNESS. See EVIDENCE.

Ese. J. J.

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